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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THOMAS J. MALONEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether evidence, conceded by the court of appeals to be favorable to the defense, ceases to be "material" under *Kyles v. Whitley*, merely because the court of appeals can also envision a construction of the evidence which, if adopted by the jury in preference to the favorable construction, might have been unfavorable to the defense?

2. Whether the test of materiality, adopted by the court of appeals, requiring that a defendant demonstrate a probability of a favorable verdict but for the suppression of evidence is contrary to that established in *Kyles v. Whitley*?

3. Whether *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) prohibits a court of appeals from erecting *per se* categories of conduct which cannot constitute withdrawal from a conspiracy?

4. Whether, under *Grunewald v. United States*, alleged acts of obstruction of justice can extend the statute of limitations in a bribery conspiracy where those acts a) occurred years after the final bribe, b) were not specifically charged as part of the conspiracy, and c) the jury was never instructed that they must find that those acts were in furtherance of the main objectives of the conspiracy?

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PETITION FOR A WRIT OF CERTIORARI

Thomas J. Maloney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 71 F.3d 645 (7th Cir. 1995).

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1995. A petition for rehearing and suggestion for rehearing en banc was denied on March 15, 1996

(App., *infra*, 39a-40a), and a petition for a writ of certiorari was originally due on June 13, 1996. On June 5, 1996, Justice Stevens extended this due date until July 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATEMENT

A.

Petitioner, Thomas J. Maloney, a former judge of the Circuit Court of Cook County, Illinois, was convicted on April 17, 1993 of RICO conspiracy, RICO bribery, extortion, and obstruction of justice, in violation of 18 U.S.C. §§ 1962(d), 1962(c), 1951, and 1503.[1] The evidence that there had been any bribery was vigorously contested, and the inconsistencies and contradictions in the government's evidence were staggering. Looming above all this

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[1] The district court's jurisdiction was based on 18 U.S.C. § 3231.

was the timeliness of the prosecution, a problem the government labored to overcome through the suppression of evidence and knowing use of false testimony.

Following Petitioner's conviction, evidence came to light which conclusively established that for years prior thereto, Earl Hawkins—one of the two witnesses on the limitations question—and other members of the notorious El Rukn street gang had enjoyed what Chief Judge Posner described in a related case as an "unprofessionally, indeed scandalously, close relationship" with prosecutor William Hogan and that Hawkins had "received a continuous stream of unlawful, indeed scandalous favors from the staff at the U.S. Attorney's Office while jailed at the MCC. . . ." *United States v. Boyd*, 55 F.3d 239, 244-245 (7th Cir. 1995).

These included Hogan's facilitation of Hawkins' illegal drug usage, sexual liaisons with visitors, unlimited personal telephone calls, protection from punishment for theft of government documents from the U.S. Attorney's Office, Hogan's intervention with prison officials, gifts, and Hawkins' personal relationship with Hogan's paralegal (who also bought him gifts, sexually enticed him, and impermissibly accepted his collect telephone calls at her home). *United States v. Boyd*, 833 F.Supp. 1277, 1295-96, 1323-25, 1326 n.44, 1327-29, 1331-32 (1993), *aff'd.*, *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995); *United States v. Maloney*, App., *infra*, 6a, 7a, 9a.

To insure that his massive violations of *Brady v. Maryland*, 373 U.S. 83 (1963) would not be detected, Hogan knowingly elicited false testimony (or failed to correct false cross-examination answers) by his El Rukn witnesses which effectively denied receipt of the benefits. That

suppression continued unabated in this case.[2]

Hawkins was pivotal to the statute of limitations, for without a change in his testimony for Hogan in four earlier trials, the timeliness of the Maloney prosecution was in serious jeopardy.[3] Hawkins' susceptibility to saying whatever Hogan wanted on this score would have been revealed by disclosure of the hitherto suppressed evidence.

The final bribe charged in the indictment allegedly occurred in June, 1986 in connection with the prosecution of Earl Hawkins and Nathan Fields, members of the Chicago "El Rukn" street gang (the "Hawkins case"). Hawkins and his lawyer in that prosecution, William

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[2] The Maloney indictment was the eighth in a series brought by Hogan involving prosecution of and/or testimony by El Rukns. In each, Hogan was lead counsel, in charge of the pre-indictment investigations, "controlled the El Rukn confidential informants, and apparently made every major decision regarding the prosecution of these cases." *Boyd*, 833 F.Supp. at 1284 n.2.

Following an intensive investigation of his gross misconduct by the Office of Professional Responsibility of the United States Department of Justice, Hogan was fired on April 11, 1996, after having been excoriated by three district judges, and the Seventh Circuit for his unprecedented suppression of *Brady* information and his knowing use of false testimony. *See Boyd*, 833 F.Supp. 1277, 1280, 1309-1313. (N.D.Ill. 1993), *aff'd.*, 55 F.3d 239 (7th Cir. 1995); *United States v. Burnside*, 824 F.Supp. 1215 (N.D.Ill. 1993); *United States v. Andrews*, 824 F.Supp. 1273 (N.D.Ill. 1993). New trials were ordered in each of these cases.

[3] In four trials over a seven year period, Hogan had Hawkins testify that a particular bribe (which turned out to be the last bribe charged in the Maloney indictment) had been returned on June 19, 1986—which would have made the Maloney indictment time-barred.

Swano, provided the only evidence critical to rebutting Petitioner's withdrawal and statute of limitations defenses.

Hawkins repeatedly testified on direct examination in the instant case that Swano told him on *June 19, 1986*, that Petitioner *had* returned the bribe in the Hawkins case, (Tr. 1558-70; App. *infra*, 41a-49a), just as he had in four other trials for Hogan over a seven year period and in his debriefing by the FBI in 1987. (Tr. 1464, 1478).

It was lethal, however, to the timeliness of Petitioner's prosecution since the indictment was not returned until June 25, 1991—six days beyond the five year statute of limitations. Thus, "under the guise of cross-examination to refresh [Hawkins'] recollection," *Douglas v. Alabama*, 380 U.S. 415, 416 (1965), Hogan got Hawkins to testify that suddenly, a month before the Petitioner's trial, he had told Hogan that Swano had merely said that Petitioner *wanted* to return the money. (Tr. 1568-70).[4]

Hogan's examination of Hawkins regarding the date of the money's return—which spanned twelve pages of transcript (Tr. 1558-70; App., *infra*, 41a-49a)—ultimately harmonized Hawkins' testimony with the subsequent testimony of Swano, who denied telling Hawkins that Petitioner *had* returned the money on the 19th, claiming he merely told Hawkins that Petitioner *wanted* to return

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[4] Hawkins' ultimate compliance came in the form of a mere "yes" to what was effectively Hogan's testimony:

> BY MR. HOGAN: "Do you remember telling me and FBI agent Ken Samuels that it was at that time, on the 27th, when he came back to tell you what the verdict was going to be and Swano actually told you that the judge had given him the money back?" (Tr. 1570).

the money (Tr. 2669, 2672-78, 3006-07) and that the bribe was returned on June 27, 1986 (Tr. 2690, 3030-31)—two days within the statute of limitations period.

Swano also claimed to have had two incriminating conversations with Judge Maloney after June 19, but before the trial ended. (Tr. 2682-87, 3022-27). If the money had been returned on June 19, these conversations, which the government offered to show that the bribe scheme was still in place, obviously would not have occurred.

Swano in addition claimed that on June 26th, he learned Maloney was not going to fix the case. (Tr. 2688). On the 27th, Swano said that Petitioner told him that a lawyer had left a file folder for him and that he should get a sheriff to retrieve it. When the sheriff—whose name Swano could not recall—was unable to find the folder, Petitioner, according to Swano, personally handed him a folder containing $10,000 in the sheriff's presence. (Tr. 2690, 3030-31). The deputy sheriffs who worked on June 27th, had no recollection of Swano receiving a file folder. (Tr. 3823-25).

Swano's interest in the timeliness of Petitioner's prosecution was no less intense than the government's. In June, 1991, the grand jury returned a 75 page RICO indictment charging that Swano was a member of and associated with the El Rukn street gang and that he conspired with 64 of its high ranking members to conduct the affairs of the El Rukns through a pattern of racketeering activity involving narcotics distribution, murder, extortion, bribery, and obstruction of justice.

The El Rukn indictment also charged that Swano bribed Petitioner in the Hawkins case on June 17, 1986, *but that the money was returned "on or about June 20, 1986."* (R.1 at 75; Tr. 2869, 2891). If convicted, Swano

could have been sentenced to life imprisonment. Swano admitted if he did not implicate Judge Maloney, Hogan "probably wouldn't have indicted Judge Maloney" and he, Swano, "would probably be on trial on [the El Rukn indictment]." (Tr. 2875).

Swano, however, did not see his indictment until the "evening" of June 19, 1991. (Tr. 2846). On that day, however, the statute of limitations on the Hawkins case elapsed (as did Swano's utility to the government)—if the money had been returned on June 19, 1986, as Hawkins had previously testified for Hogan.

Not surprisingly, three days later, Swano was a cooperating witness (Tr. 2873) to a superseding indictment, *which had changed the date of the money's return to June 27, 1986*—a date within the limitations period. (R. 7 at 9, ¶(p).[5]

This was not the only limitations-related change in the Petitioner's indictment. It additionally charged Petitioner with obstruction of justice based on two alleged conversations with Swano in 1988 and 1990, when Petitioner asked if Swano was "standing tall" and if he needed a lawyer or any help. (Tr. 3042, 2763-65). These obstructions (like Hawkins' "testimony") were intended to provide further insurance against the prosecution being time-barred, for the government argued these events extended the RICO conspiracy into 1990.

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[5] Swano knew at the time that the statute of limitations applicable to the Hawkins case was five years. (Tr. 2847). Under the superseding indictment and Swano's plea agreement, Swano's maximum sentence was 10 years of non-guidelines time with the possibility of probation. (Tr. 2875-77).

B.

The district court denied motions for a new trial based upon the government's *Brady* violations, and a divided panel of the court of appeals affirmed. The majority did not deny that in this case, as in the others, Hogan suppressed evidence of the steady stream of illicit benefits bestowed on Hawkins, and it conceded that the evidence would have been helpful to Maloney. Nonetheless, it concluded that the admittedly favorable evidence was not material. App., *infra*, 11a.

While paying lip service to *Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the majority reasoned that the evidence might also have been viewed by the jury in a harmful sense. The theory—never advanced by the government at trial, suggested by the district court, or argued by the government on appeal—was that the jury could have concluded that Hawkins' drug usage could have affected his memory so that his initial testimony that the money was returned on the 19th would not have been credited. App., *infra*, 11a.

Apart from its facial implausibility and its failure to consider the plethora of other suppressed evidence relating to bias which had no effect on competency, the majority's thesis ignored *Kyles*' teaching that where suppressed evidence is admittedly favorable, it is not for the court of appeals to devise an alternative theory and then speculate how the jury might have treated the evidence.

The majority further reasoned that even if the suppressed evidence would have caused the jury to believe the bribe was returned on June 19th, it was still immaterial since the return of the money could not, as a matter of law, constitute withdrawal. App., *infra*, 13a.

Finally, the majority concluded that the suppressed evidence was necessarily immaterial, since the alleged 1988 and 1990 obstructions of justice were part of the conspiracy and clearly within the statute of limitations. App., *infra*, 21a-24a.

Judge Ripple dissented. He recognized that "if the jury had been permitted to hear the evidence of prosecutorial misconduct, it might well have rejected the government's submission that the conspiracy continued within the time period covered by the statute of limitations." App., *infra*, 34a.[6]

Judge Ripple also concluded that withdrawal was an issue for the jury, which,

> "in this case . . . was entitled to conclude on the basis of the evidence that Maloney had taken the affirmative act of returning the $10,000 money. Such an act is *certainly* a communication, made to a fellow coconspirator, of his abandonment of the conspiracy, and could constitute withdrawal." App., *infra*, 36a. (Emphasis supplied).

Judge Ripple further argued that the majority's reliance on the obstructions to continue the conspiracy's duration for limitations purposes was at odds with *Grunewald v. United States*, 353 U.S. 391 (1953). App., *infra*, 36a-37a.

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[6] Judge Ripple recognized that Hawkins' testimony was necessarily intertwined with Swano's and that if the jury knew of Hawkins' "benefits", it could have concluded not only that Hawkins lied about the date the money was returned, but that Swano did as well—and all for the purposes of resurrecting a time-barred case.

REASONS FOR GRANTING THE PETITION

The petition should be granted because each facet of the majority's rationale conflicts with established decisions of this Court and those of other circuit courts of appeals.

The majority's holding that evidence admittedly favorable to a defendant ceases to be "material" because a court of appeals can imagine an evidentiary theory under which a jury might have viewed the suppressed evidence adversely to the defendant, conflicts with this Court's decision in *Kyles v. Whitley*, ___ U.S. ___, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

The majority's requirement of a "reasonable probability that disclosure would have resulted in acquittal" flatly contravenes *Kyles* which unequivocally "rejected a standard that would require a defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal." *Kyles*, 131 L.Ed.2d at 506. *Accord United States v. Agurs*, 427 U.S. 97 (1972).

The majority's holding that, as a matter of law, the return of the final bribe of a bribery conspiracy to one's coconspirator, coupled with a complete cessation of bribery activity after its return is insufficient to constitute withdrawal and to authorize a jury instruction on the issue of withdrawal is contrary to this Court's decision in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), and creates a conflict with the Third Circuit's decision in *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995) and those of other circuits.

Finally, the majority's holding that alleged acts of obstruction of justice can extend the statute of limitations in a bribery conspiracy even though those acts occurred

years after the final bribe, were not specifically charged as part of the conspiracy, and the jury was never instructed that they must find that those acts were in furtherance of the main objectives of the conspiracy is contrary to this Court's decision in *Grunewald v. United States*, 353 U.S. 391 (1953).

A. The Suppressed Evidence Was Material

1.

Admitting that the suppressed evidence could have bolstered Petitioner's case on the limitations issue, the majority tendentiously reasoned that it was "equally possible" that it would have undercut the defense. Thus, it was "immaterial." *Kyles v. Whitley*, however, rejected as a test of materiality a showing that the defendant more likely than not would have received a different verdict had the jury known of the suppressed evidence. *See also United States v. Smith*, 77 F.3d 511, 514 (D.C. Cir. 1996).

By requiring a finding of immateriality where it was "equally possible" that the suppressed evidence would not have been helpful, App., *infra*, 11a, the majority's decision fashioned a standard even less rigorous than that disavowed by *Kyles*, and, as Judge Ripple's dissent emphasized, subverts the jury's exclusive fact-finding function. In effect, the majority opinion improperly treated the case as though it were an ordinary review of a sufficiency of the evidence claim where the evidence must be taken in the light most favorable to the government. But claims of suppression of evidence are radically different as *Brady* and *Kyles* make clear.

Relying on *Kyles*, the Circuit Court of Appeals for the District of Columbia in *Smith*, *supra*, stressed these very

points in its recent reversal of a conviction based on suppression of evidence of "favors" one of its witnesses anticipated:

> As the Court made clear in *Kyles*, the test for materiality is *not* a sufficiency-of-the-evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." . . . . Indeed, a sufficiency-of-the-evidence test would require appellate courts to usurp the function of the jury, for judges would be forced to *guess*, based on a cold record, how the jury might have weighed the remaining evidence, standing alone, in a hypothetical error-free trial. Because such an inquiry is inherently unreliable, *Kyles* rightly focuses attention instead on the potential impact the undisclosed evidence might have had on the fairness of the proceedings. [footnote omitted]. Thus, the amount of additional evidence indicating guilt is not dispositive of our inquiry. Instead, we must decide whether the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict." 77 F.3d at 515 (Emphasis in original).

Equally erroneous is the majority's conclusion that a reviewing court can select between competing evidentiary choices—a proposition at odds with *Kyles*, 131 L.Ed.2d at 515, and the jury's role under our constitutional scheme. *See also Boyd*, 55 F.3d at 246. As Judge Ripple's dissent demonstrated, the determination of how the suppressed evidence would have affected the jury's assessment of Hawkins was exclusively for the jury, App., *infra*, 35a, the constitutional tribunal provided for trying facts in federal criminal cases. *See Duncan v. Louisiana*, 391 U.S. 145, 155-157 (1968); *United States v. Delano*, 55 F.3d

720, 730 (2d Cir. 1995) ("It is for the jury, not a reviewing court, to choose among competing inferences and explanations."); *Roy v. Gomez*, 81 F.3d 863, 867 (9th Cir. 1996) (same).

By refusing to allow the jury to consider the impact of the suppressed evidence on the limitations question, the majority opinion has created a regime of appellate fact-finding in *Brady* cases that is at odds with *Kyles* and the Sixth Amendment.

The guarantee of trial by jury reflects a profound judgment about the way in which law should be enforced and justice administered in this Nation. Reluctant to entrust plenary powers over the liberty of citizens even "to a group of judges," those who wrote our Constitution accorded defendants in criminal cases the right to "the commonsense judgment of a jury" even to the "more tutored" reactions of a federal judge. *Duncan v. Louisiana*, *supra*, 391 U.S. at 155-156; *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078, 2080 (1993).

Whether right or wrong, the premise underlying the Sixth Amendment is that a lay jury is better able than specialists to decide factual questions. *United States v. Quarrels*, 350 U.S. 11, 18 (1955). *Cf. Cabana v. Bullock*, 474 U.S. 376, 384-85 (1986); *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring). The majority's opinion cannot be reconciled with these core principles.

2.

Even a cursory review of the facts demonstrates the materiality of the suppressed evidence.

The government conceded on appeal (and the majority did not deny) that without the bribe from Swano to Peti-

tioner in the *Hawkins* case in June, 1986, and without Petitioner's alleged obstruction of Swano in 1988 and 1990, the entire case was time-barred. (Gov. Br. 42). As explained below, Hogan's suppression of the evidence of his singular and sordid relationship with Hawkins was essential to the maintenance of all four counts of the indictment, which were bottomed on the same factual matrix.

The timeliness of the prosecution was dependent upon two witnesses, Earl Hawkins, who Hogan falsely assured the jury had no motive to lie (Tr. 4590-91), and William Swano, who Hogan said "wouldn't lie" since the indictment was a transforming event in his moral life. (Tr. 2855-57, 3247, 4585). The credibility of Hawkins and Swano on the statute of limitations issue were intertwined. Each placed the return of the last bribe within the statute of limitations period, and Swano provided the additional insurance of timeliness through his *uncorroborated* claims that: (1) he had spoken with Petitioner after June 19 about the bribe and (2) that Petitioner had sought to influence his cooperation with federal authorities in 1988 and 1990.[7]

Hawkins' *pro tanto* corroboration was essential since Swano, by any measure, was a despicable fellow, who had been severely impeached and who, in a secretly recorded conversation by a government informant, had vehemently denied any personal contact with Petitioner:

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[7] The compliant Hawkins, eager to support the government's theory that a bribe had in fact occurred and that Swano was not merely "rainmaking," enthusiastically vouched for Swano's integrity in the deal and Petitioner's faithlessness. (Tr. 1572-1574).

> "*. . . I haven't talked to Maloney in three years, four years. I've had no personal contact with Tom Maloney in three or four years.* . . . I'm not, I'm not bullshitin' ya. I'm telling ya. No personal contact with him whatsoever. . . . No phone calls, *no meetings*, no lunches, no chambers, no hallway; *no nothing.*" (Videotape of Cooley and Swano 6/23/87, Tr. 2852, 2223-26) (Emphasis supplied).

Hawkins had testified in four trials over a seven year period for Hogan that on June 19, 1986, Swano told him that Petitioner *had* returned the bribe money in his state court case. He repeatedly persisted in that testimony on direct examination in this case (App., *infra*, 41a-47a) until Hogan got him to say that Swano had merely said that Petitioner had *wanted* to return the money on the 19th and that the actual return did not occur until a week later.[8]

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[8] By characterizing Hogan's conduct as an attempt at impeachment, App., *infra*, 10a, the majority sought to paint an innocuous patina on that conduct. A reading of the transcript demonstrates how significant Hogan himself deemed the testimony to the statute of limitations question. Moreover, it is incorrect to call what Hogan did impeachment: The evidence was not offered for any limited purpose, and the jury was never instructed that it was. Any possibility, slight at best, that it would have used the evidence in a limited fashion, *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984) (Posner, J.), was invalidated by Hogan's rebuttal in which he argued, not that Hawkins was impeached, but how *each* of the government's witnesses corroborated the other. (Tr. 4578). *Reciprocal corroboration* regarding the return of the money was impossible unless the testimony of Swano and the "impeachment" of Hawkins both were offered for their truth.

On appeal, the government no longer contended that Hawkins had pegged the date for the return of the bribe on June 27. It argued that he had reaffirmed the June 19 date and

(continued...)

Had the jury been apprised of the suppressed evidence, "a substantial implication that the *prosecutor had coached* [Hawkins] to give [a false story about the date of the return of the bribe]" would have been "rais[ed]." *Kyles*, *supra*, 131 L.Ed.2d at 512.[9] This is a classic form of spoliation which would have operated against the government's entire statute of limitations presentation. 2 Wigmore, **Evidence** §278 at 133 (3d Ed. 1940).

The jury could thus reasonably have concluded that Hogan similarly had Swano fabricate the date of the return of the money and the two mid-trial conversations (App., *infra*, 5a) to ensure that the conspiracy continued past June 25, 1986 to bring it within the statute of limitations. Why else the elaborate emphasis on the date of the return of the money and Hogan's desperate endeavor to have Hawkins change his testimony?

Obviously, if the money had been returned on the 19th, as Hawkins had repeatedly tried to testify, *and as Hogan's initial indictment against Swano charged* (R.1 at 75, ¶113), the post-June 19 conversations with Petitioner could not possibly have occurred. And if the jury conclud-

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[8] (...continued)

that his testimony was thus actually helpful to the defense. If the government's trial and appellate counsel could not agree on the meaning of Hawkins' vacillating testimony, it is an impermissible guess to say how the jury actually viewed the testimony. To say that its resolution of which of Hawkins' versions to believe would not have been aided by disclosure of the suppressed evidence blinks reality.

[9] The majority's "equally possible" theory only addressed Hawkins' drug usage. It ignored the numerous and predominating facets of the suppressed evidence which related exclusively to bias and had nothing to do with competency.

ed Swano lied about all this—the only purpose of which would have been to avoid the statute of limitations—they could well have disbelieved his testimony about the 1988 and 1990 obstruction conversations which also served that end. *Cf. Kyles*, *supra*, 131 L.Ed.2d at 513 (suppressed evidence could have called into question the reliability of the investigation "in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.") (parentheses in original).

Were that to happen, the government's entire case was at risk of being time-barred. Phrased differently, "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 131 L.Ed.2d at 506. Thus, in a very real sense, Hawkins' credibility on the issue of the June 19 conversation could have been outcome determinative on the limitations issue.[10]

The majority's requirement of a "reasonable probability that disclosure would have resulted in acquittal" flatly contravened *Kyles* which unequivocally "rejected a standard that would require a defendant to demonstrate that the evidence if disclosed probably would have resulted in

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[10] The majority's conclusion that this analysis is a "fairly substantial stretch" (App., *infra*, 11a) ignores *Kyles* and the reality of what occurred in connection with Hogan's frenzied endeavors to place the return of the money on the 19th. Within a year of the bribe, Hawkins told the FBI the money was returned on the 19th. He had no motive to lie about the date then, or during the next seven years as he repeatedly testified for Hogan in other cases that the 19th was the date. With all respect, it is a "fairly substantial stretch" to conclude anything other than that Hogan had Hawkins and Swano lie about the limitations issues. *But these were issues for the jury, not circuit judges.*

acquittal." *Kyles*, 131 L.Ed.2d at 506. *Accord United States v. Agurs*, 427 U.S. 97 (1972). Indeed, *Kyles* found the discredited probability of acquittal standard sufficiently critical to articulate its rejection in five different ways. 131 L.Ed.2d at 506. *Accord Smith*, *supra*, 77 F.3d at 514.

The jury could have credited Hawkins and Swano even had they known of the suppressed evidence. But the question is whether the jury's "possible findings" to the contrary were foreclosed by the suppression. *Kyles v. Whitley*, 131 L.Ed.2d at 518. Usurping the role of the jury, the majority opinion selected findings supportive of the verdict. This sort of judicial speculation and arbitrary selection among alternative hypotheses is foreclosed by *Kyles*, 131 L.Ed.2d at 515, and the Sixth Amendment. *See also Sullivan*, *supra*, 113 S.Ct. at 2082.

In opposing rehearing, the government sought to minimize the import of Hawkins' testimony (and hence of the suppression) by casting him as merely 1 of 40 witnesses viewed by the district court over a six week trial. (Answer at 2 n.2, 4, 10). This ignored the critical fact that, *on the limitations issue*, Hawkins was one of but *two* witnesses—the other being Swano whose testimony was inescapably interwoven with Hawkins' on this issue.[11]

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[11] Moreover, the "six week" trial claim ignored a one week recess, two court holidays, and the fact that the government's case—of which Hawkins was a central witness—lasted only 16 days. And the suggested brevity of Hawkins' testimony is belied by its having spanned 279 pages (Tr. 1435-1714) during which the district court expressed impatience at its duration. (Tr. 1566). Curiously, the district court's expressions of concern occurred during Hogan's struggle to get Hawkins to change his testimony—(i.e. immediately prior to the recess

(continued...)

Indeed, in opposing rehearing, Swano was the only witness besides Hawkins the government could point to on the limitations issue. (Govt. Answer to Petition for Rehearing at 9). It thus inaccurately claimed that wiretaps of El Rukn conversations also supported an "ongoing fix" after June 19, 1986. *Id.* They did not.[12]

These conversations were between El Rukn members (other than Hawkins and Swano) and only reflected reports by El Rukn's to their leader, Jeff Fort, of what Swano had told them. They demonstrated only that on June 19, 1986, Swano told them the "fix is off"—a statement consistent with his report to Hawkins that the bribe had been returned. This was naturally followed by Fort's demand for the return of the bribe money. Eager to retain the money, Swano, then changed positions and told the El Rukns he had "overreacted", that the fix wasn't necessarily off, that things started going well, and ultimately that the fix was back in. (See App., *infra*, 58a-64a).[13]

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[11] (...continued)
during which Hogan regrouped and returned to "impeach" Hawkins). That the government realized the absolutely essential nature of the testimony (deemed immaterial by the government on appeal) was evidenced by Hogan's co-prosecutor's plea to the court for patience: "Judge, we're putting in our case. Aren't we allowed to have whatever time we need to put it in?" (Tr. 1565-66; App., *infra*, 46a).

[12] We were not allowed to file a reply brief in support of rehearing addressing the inaccurate arguments made for the first time in the government's answer to the petition for rehearing.

[13] Swano's statements to the El Rukns were not dispositive of whether the bribe money had been returned. The question was whether he was telling the truth to Hawkins and was lying to
(continued...)

The balance of the wiretaps reflect Fort's belief that the judge was not going to fix the case and his strong suspicion that Swano actually *had* the money but was "lyin" and "playing games" with them about its return so that he could ultimately keep it for himself. (See App., *infra*, 65a-70a).

Had Swano admitted at Petitioner's trial that the money had actually been returned on June 19, it would not only have hurt the government's case on the limitations question, it would have revealed that the El Rukns had been deceived by Swano, with potentially lethal consequences for Swano after the trial. Thus, the wiretaps scarcely buttressed a June 27, rather than June 19 return date.

But all of this was for the jury. The government's suppression deprived them of the ability to make the constitutionally mandated credibility evaluations, and the district court's refusal, sanctioned by the majority, to have given a withdrawal instruction prevented the jury from determining whether the conspiracy had come to an end five years before the indictment and was thus time-barred.

B. The Refusal Of The Withdrawal Instruction Was In Conflict With This Court's Decision In *United States v. United States Gypsum Co.* And With Decisions Of Other Circuits

The majority's fallback position was that even if the suppressed evidence would have caused the jury to

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[13] (...continued)
the El Rukns. Without the suppressed evidence, the jury could not make an informed determination.

believe the bribe was returned on the 19th, it was immaterial because the alleged acts of obstruction in 1988 and 1990 were sufficient to extend the conspiracy for limitations purposes, and the return of the bribe could not, as a matter of law, constitute a withdrawal from the conspiracy. App., *infra*, 11a.

The first prong of this argument overlooked the effect that the suppressed evidence could have had on the jury's assessment of whether Hawkins and Swano had been coached to fabricate their testimony. *See Kyles v. Whitley*, *supra*. If the jury concluded they had, it could have disbelieved Swano's claim of obstruction. The entire case would then have been time-barred.

There are two deficiencies in the second prong of the majority's argument. First, it is contrary to *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), where this Court refused to sanction an instruction to the jury which limited its consideration of the kinds of conduct which could constitute a withdrawal from a conspiracy. The Court cautioned against placing "confining blinders" on "the jury's freedom to consider evidence regarding the continuing participation of alleged conspirators in the charged conspiracy." *Id.* at 464. *Accord United States v. Antar*, 53 F.3d 568, 582 (3d Cir. 1995).

The Court refused to canalize within narrow bounds conduct from which a jury could find withdrawal. All that need be shown are "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach coconspirators. . . ." *Id.* "There is no single way withdrawal can be established; in large part whether a particular action constitutes withdrawal depends on context." *Id.* at 582.

In the instant case, the majority sanctioned the district court's refusal to give any instruction, even though as Judge Ripple noted, there was "no demonstration that Maloney continued to endorse the purpose of the conspiracy" (App., *infra*, 36a), and there was ample evidence that Petitioner would be unreceptive to future bribes after June 19. Indeed, there was intense federal law enforcement scrutiny directed against Petitioner: Agents were in visible attendance in the courtroom during the *Hawkins* trial; *by late 1986, Petitioner had concluded that Swano was cooperating with the government and wearing a wire*; by at least 1988, there was a massive grand jury investigation of which Petitioner was aware, and he had been told by Swano that the IRS had targeted him. App., *infra*, 5a-6a, 15a, 16a n.7, 19a.[14]

Under these circumstances, the jury surely could have inferred "the unlikelihood of [Petitioner's continuing to conspire with] a person" believed to be a government operative during a massive federal investigation of which he was a target. *United States v. Borelli*, 336 F.2d 376, 390 (2d Cir. 1964) (Friendly, J.). *Cf. Grunewald v. United States*, *supra*, 353 U.S. at 406-415 (conspiracy "abandoned . . . when investigations of the petitioners started in Congress").

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[14] While adverting to these critical facts, the majority's conclusion of evidentiary insufficiency on the withdrawal issue (App., *infra*, 23a n.11) accorded them no relevance and ignored their obvious significance. It also overlooked the principle that a defendant is entitled to have the jury consider any valid theory, which has some foundation in the evidence, however tenuous. *See Stevenson v. United States*, 162 U.S. 313, 314 (1896).

The second analytical flaw in the majority's reasoning was its usurpation of the jury's exclusive function of determining the facts in a criminal case. In a rather stark example of judicial fact-finding, the majority concluded that the return of the bribe was merely Petitioner's performance of his "conditional" contract with Swano—an act "more akin to a deal gone sour than an affirmative attempt to defeat the purposes of the conspiracy." App., *infra*, 13a.

This conclusion was, as Judge Ripple's dissent made clear, one for the jury, not a court of appeals. App., *infra*, 35a. *See also United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989). Other circuits have recognized that it is the jury's exclusive function to determine the meaning of conduct, susceptible to multiple interpretations, claimed to constitute withdrawal. *See e.g., United States v. Gornto*, 792 F.2d 1028, 1043 (11th Cir. 1986) (slamming the door in the face of a coconspirator); *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976) (incarceration without more was enough to raise the issue of withdrawal); *United States v. Juodakis*, 834 F.2d 1099, 1103 (1st Cir. 1987) (abrupt move to another state, coupled with the absence of evidence of subsequent involvement with the other conspirators); *United States v. Guanti*, 421 F.2d 792, 797 (2d Cir. 1970) (ambiguous conversation between the conspirators). *Compare Kyles, supra*, 131 L.Ed. 2d at 515 (meaning of statement susceptible of two interpretations was for the jury).

The majority's determination (which at bottom is essentially a jury argument) constitutes an implicit factual conclusion that Petitioner's intent could not have been to withdraw but merely to keep his part of the conditional bargain, which was to return the money if

Swano made a poor showing. App., *infra*, 12a. Beyond the fact that the context in which the money was returned would have allowed the jury to conclude otherwise, "[i]t goes without saying that matters of intent are for the jury to consider." *McCormick v. United States*, 500 U.S. 257, 270 (1991).

The only case cited by the majority to support its conclusion that the return of the bribe could not be an act inconsistent with the objectives of the conspiracy was *United States v. Pofahl*, 990 F.2d 1456 (5th Cir. 1993) (App., *infra*, 13a), in which the Fifth Circuit concluded that the district judge had not clearly erred in determining, under the Sentencing Guidelines, that the defendant's cancellation of his trip to Guatemala following the arrest of a coconspirator was not an act of withdrawal.

As a mere affirmance of a sentencing determination as not clearly erroneous, *Pofahl* does not pretend to hold that had the issue been presented at trial, the jury would not have been allowed to consider it. *Compare Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.").[15]

C. The Majority's Conclusion That The Alleged Obstructions Extended The Conspiracy Is In Conflict With This Court's Decision In *Grunewald v. United States*

In *Grunewald v. United States*, 353 U.S. 391 (1953), this Court distinguished between concealment in further-

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[15] The only *a priori* exclusion approved by this Court and the circuit courts of appeals is mere inactivity. *Borelli*, *supra*, 336 F.2d at 388.

ance of the conspiracy's main objectives and those done to avoid detection. The former extend the conspiracy for purposes of the statute of limitations; the latter do not. The Seventh Circuit has never been particularly hospitable to *Grunewald*. *See United States v. Morgano*, 39 F.3d 1358, 1370 n.5 (7th Cir. 1994) (referring to *Grunewald*'s analysis as "marginal"), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2559, 132 L.Ed.2d 813 (1995).

That disapproval may account for the majority's *ipse dixit* that *Grunewald* was inapplicable because the conspiracy here was to fix cases "whenever feasible" (App., *infra*, 23a). That conclusion expands even the elastic concept of conspiracy beyond tolerable bounds, would essentially "wipe out", 353 U.S. at 402, the statute of limitations in conspiracy cases involving bribery, and ignores *Grunewald*'s requirement that such a theory not only have a sufficient evidentiary basis, but that the jury be meticulously instructed as to that precise theory. Neither requirement was met here.

The indictment, unlike that in *Grunewald*, did not pretend to articulate such a theory, and neither Swano nor anyone else ever testified that the object was to bribe "whenever feasible." The absence of any post-*Hawkins* bribes by Swano in other cases in which Maloney was the judge was, at the very least, inconsistent with the majority's thesis.

Under circumstances far more favorable to the government than exist here, *Grunewald* rejected the argument that efforts to conceal a tax fixing conspiracy extended the statute of limitations:

> The Government also suggests a further theory under which this conspiracy could be deemed to have lasted into the indictment period. Under this theory,

the central aim of the conspiracy was not specifically to "fix" the tax troubles of Gotham and Patullo, *but to engage in the continuing business of fixing any and all tax-fraud cases.* If this were the aim of the conspiracy, acts of concealment could have been in furtherance of this aim by enabling them to stay in business so that it could get new cases.

* * *

We cannot accept this theory of the Government. The trouble is not only that the theory was never submitted to the jury, but that no overt act done to further the purpose of engaging in "new" business was charged or proved to have occurred after October 25, 1951. If one of the purposes of the conspiracy was to engage in the business of fixing tax cases generally, it must be deemed to have been abandoned in 1951, when investigations of the petitioners started in Congress, since the 1951 and 1952 activities of the conspirators consisted merely of covering up old ventures rather than seeking new ones, and since there is no indication that there was an intent to resume operations after the investigations had ended. 353 U.S. 406-407 n.20 (Emphasis supplied).

The jury instructions in the instant case were totally barren of any reference to the central purpose of the conspiracy as one to fix cases "whenever feasible" and totally barren of any requirement that the jury find such a central purpose—despite *Grunewald*'s explicit requirement that the jury be meticulously instructed that it must find that efforts at concealment are in furtherance of the conspiracy's main objectives and not merely designed to conceal its existence.[16]

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[16] Here, the instructions merely set forth the elements of conspiracy and obstruction without requiring the jury to deter-

(continued...)

In *Grunewald*, the Court reversed the conviction since the jury had not been adequately instructed regarding the question of whether the concealment efforts were in furtherance of the conspiracy's objectives or were mere attempts at concealment:

> For the charge as given failed completely to distinguish between concealment in order to achieve the central purpose of the conspiracy . . . and concealment intended solely to cover up an already executed crime. . . . As far as we know, therefore, the present convictions were based on the impermissible theory discussed in the first part of this opinion—namely, that a subordinate agreement to conceal the conspiracy continued after the central aim of the conspiracy had been accomplished.
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> * * *
>
> We thus find that the judge's charge left it open for the jury to convict even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime. And this, we think, was fatal error. For the facts in this record are equivocal.
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> * * *
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> Under such circumstances, therefore, it was essential for the judge to charge clearly and unequivocally that on these facts the jury could not infer a continuing conspiracy to conceal the conspiracy, whether actual

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[16] (...continued)

mine whether the obstructions were in furtherance of the conspiracy's main objectives rather than to conceal its existence.

Nor did the statute of limitations instructions mention the distinction. Indeed, they only required that the obstruction occur within the limitations period. That is plainly inadequate under *Grunewald*. Tr. 4635, 4639, 4643-44, 4651-52.

or implied. Further, it was incumbent on the judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the taxpayers from prosecution, that this objective continued in being through 1951, and that the overt acts of concealment proved at trial were at least partly calculated to further this aim. 353 U.S. at 411-415.

In *Grunewald* the instructions although inadequate were extensive.[17] In the instant case, there were no

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[17] "On this issue, it will be necessary for you to determine whether, beyond a reasonable doubt, you can conclude that the conspiracy . . . comprehended an agreement to conceal and whether some overt act took place in the period of three years prior to October 25, 1954 to carry out such purpose of the conspiracy.

* * *

To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when Patullo Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigation, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the in-

(continued...)

instructions which distinguished between concealment to achieve the central purpose of the conspiracy and concealment intended solely to cover up an already executed crime.

In *United States v. Shields*, Lexis 15390 (N.D.Ill. 8/16/91), the court held inadmissible certain conspiratorial conversations which, as here, "significantly postdated the principal events underlying the alleged conspiracy." *Id.* at 6. The court rejected the argument that it would be reasonable to infer that Judge Shields and a coconspirator had an interest in concealing their wrongdoing so that Shields' judicial "position would not be jeopardized." *Id.* at 11. That interest was not sufficient, however, to render conspiratorial statements admissible on the theory that they were in furtherance of the alleged conspiracy.

To paraphrase the First Circuit in *United States v. Twitty*, 72 F.3d 228 (1st Cir. 1995), any agreements to conceal "occurred late in the day when the conspirators knew the agents were on their trail and active [bribery] had come to an abrupt halt. On any realistic view of the matter, [Swano and Petitioner] were engaged 'only [in] covering up after the crime.' " *Id.* at 233.

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[17] (...continued)

> dictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy." 353 U.S. at 411-415.

D. The Questions Presented Are Both Recurring And Important

With unceasing frequency, the inferior federal courts are called upon to decide questions of materiality where there has been suppression of evidence. The majority opinion in this case is at odds with *Kyles*, and if allowed to stand, will dilute *Kyles* and allow appellate judges to create and ultimately to choose among competing evidentiary inferences.

Questions of withdrawal from a conspiracy and post-conspiracy acts of concealment occur virtually on a daily basis in the federal courts. The majority opinion has created an incorrect and dangerous precedent which, if not corrected, can seriously affect the administration of the criminal law in federal courts by allowing the "widening of the scope of conspiracy prosecutions since it [authorizes] extend[ing] the life of [a] conspiracy indefinitely." *Grunewald*, 353 U.S. at 401-402. It is essential to reaffirm that this Court will "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Id.* at 404.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 94-2779

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS J. MALONEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 CR 477—**Harry D. Leinenweber,** *Judge.*

ARGUED JUNE 8, 1995—DECIDED NOVEMBER 29, 1995

Before CUMMINGS, ESCHBACH, and RIPPLE, *Circuit Judges.*

ESCHBACH, *Circuit Judge.* This is yet another in an unfortunately long line of public corruption cases which have left a blot on the escutcheon of Chicago justice. Thomas R. Maloney, a former judge in the Circuit Court of Cook County, appeals from his conviction on charges of racketeering conspiracy, racketeering, extortion under color of official right, and obstruction of justice, in violation of 18 U.S.C. §§ 1962(d), 1962(c), 1951, and 1503, respectively, in connection with his taking bribes in cases before him. Among his many grounds for appeal, Maloney contends that he should have been granted a new trial due to the

government's failure to disclose improper benefits bestowed upon two "El Rukn" witnesses. The district court denied Maloney's motion, finding that further impeachment of these witnesses would not have changed the outcome. We affirm.

I.

Thomas Maloney assumed his position on the bench in 1977 and remained there until his retirement in 1990. According to the jury's findings, during that time he took bribes and agreed to "fix" four cases,[1] including three murder cases, and obstructed justice in relation to the investigation of these bribes. Generally, these bribes were accomplished through the use of a "bagman," or intermediary between the lawyer desiring the fix and the judge. Maloney used a bailiff, Lucius Robinson, as his bagman until Robinson's reputation became a liability during the "Greylord" investigation of Chicago judges. Maloney then switched to Robert McGee, who practiced law with Maloney from 1973 until 1977.[2]

The first bribe charged in the indictment occurred in May 1981. Attorney Robert Cooley was contacted by First Ward Alderman Fred Roti and Ward Secretary Pat Marcy to represent Lenny Chow, a hit man for the On Leong crime organization, and two others who were charged with attempted murder for shooting William Chin in Chicago's Chinatown. An On Leong representative, William Moy, told Cooley he wanted a guaranteed not guilty verdict. The case was before Judge Maloney and Marcy assured Cooley that the Judge could be bought, but warned him

[1] A fifth bribe was charged in the indictment, but the jury did not find that this bribe was committed.

[2] McGee was Maloney's co-defendant in this case and was convicted on all counts charged against him. His case, however, is not the subject of this appeal and we make no comment about the correctness of the verdict or the sentencing as it applied to him.

that Judge Maloney "wants a lot of money on this one." Moy agreed to pay $100,000, a portion of which Marcy gave to Maloney as part of the fix. Chin died, however, and the charges were elevated to murder. Despite this, Marcy was able to get Judge Maloney to allow the prior bond to stand as long as a friend of Judge Maloney joined as co-counsel. At trial, Judge Maloney admitted a dying declaration, but found it unreliable, thus acquitting the defendants. Tapes of a conversation between Cooley and Marcy made after Cooley became an informant confirmed the existence of the fix.

The government introduced evidence of another bribe which was not charged in the indictment, but occurred during this period, to demonstrate Judge Maloney's membership in the conspiracy. In 1980, William Swano represented Wilfredo Rosario in a double murder case before Judge Maloney. The critical evidence against Rosario was his confession. When Swano was discussing this case with Lucius Robinson, Robinson indicated he could arrange a fix with Judge Maloney for between $2,000-$2,500. Doubtful, Swano asked that a personal meeting be arranged. At this brief meeting outside his chambers, Judge Maloney told Swano that Robinson is "my guy, deal with him," whereupon, in Maloney's presence, Swano allegedly handed Robinson a white envelope with a portion of the bribe. In 1981, Judge Maloney suppressed the confession and found Rosario not guilty.

Swano, Robinson and Judge Maloney continued this arrangement for a few years. In 1982, Swano represented Ronald Roby in five deceptive practices cases which he had consolidated before Judge Maloney. Although the total dollar amount was small, Roby feared that he would be imprisoned because of his prior conviction for a similar offense in 1980. Thus, Swano sought out Robinson to arrange a fix which would guarantee no prison time. Roby testified that a bribe was to paid out of his $5,000 "fee." During a plea conference, Maloney sentenced Roby to probation with work release on Sundays and Mondays. Soon after, according to Robinson's testimony, he passed along

$2,300 to Judge Maloney at a McCormick Place Lounge Maloney had suggested as a meeting place. Robinson also testified that a few days later, while riding alone with Judge Maloney in the judges' elevator, Maloney gave him $200-$300 for his work as a bagman on the case.

The third bribe charged in the indictment occurred in late 1982. Owen Jones was charged with felony murder after beating a man to death with a pipe during a burglary. Swano was hired and explained the details of the case to Robinson in hopes of securing a fix. A few weeks later, however, when Swano went to court for the Jones case, Robert McGee approached him and explained that Robinson had become "too hot" to serve as a bagman for Judge Maloney anymore. Thus, Maloney asked McGee to take over. McGee told Swano that the best the Judge would do on the Jones case would be to acquit on felony murder, convict on voluntary manslaughter and impose a nine year sentence. Agreeing that this was preferable to a likely twenty year sentence for felony murder, Jones' mother agreed to pay Swano $4,000-$5,000 for the fix. After trial, Jones was found guilty of voluntary manslaughter and sentenced to nine years.

The final bribe charged in the indictment took place a few years later. In June 1985, Earl Hawkins and Nathan Fields, members of the El Rukns, were charged with murdering two men. Judge Maloney was assigned the case and Swano represented Hawkins. Swano assured Hawkins that he could win a decision in his favor in a bench trial if Hawkins could raise enough money for the Judge. Hawkins referred him to Alan Knox, a "senior" El Rukn general, who approved the fix. Swano testified that he met with McGee in January or February of 1986 to discuss the fix and they arrived at a figure of $10,000. According to Swano, McGee talked with Maloney and confirmed the figure, but McGee told Swano that the fix was conditional upon Swano putting on a "a good case" so Judge Maloney would not look bad. Swano then informed the El Rukns that the bribe was on, although he padded the figure to $20,000 to ensure some money for himself. He had some

difficulty, however, collecting the bribe money from the El Rukns. Finally, the morning of trial, surveillance records indicate Swano left court and went to the El Rukn headquarters to get the money, and that Knox later arrived at the courthouse with a bulge in his pocket which appeared to be a roll of bills. Swano called McGee to confirm the fix and gave him a file folder with the money at the Mayor's Row restaurant. The case proceeded to a bench trial. On June 17th and 18th, the State put on its case where three eye-witnesses identified Hawkins as the murderer. By this time, the FBI had become suspicious of Judge Maloney and of the Hawkins/Fields case, and its agents were watching the trial closely. This attention, coupled with the strength of the State's case, prompted Judge Maloney to have second thoughts. Thus, McGee called Swano at 11:23 a.m. on June 19th in the anteroom outside Judge Maloney's chambers to inform him that he needed to "give the books back that he had given him the other day." Swano, hoping to salvage the fix, told McGee to "hold onto the books" at least until the defense could put on its case. According to Hawkins' testimony, Swano came back from the Judge's chambers and told him that Judge Maloney had returned the bribe money. Swano testified, however, that he had in fact persuaded McGee to talk to Judge Maloney about continuing the fix and was, at least temporarily, successful. Swano also testified that he confirmed the existence of the fix with Judge Maloney himself on two occasions. By the end of trial on June 26th, though, Judge Maloney apparently believed that Swano had not lived up to his end of the bargain by putting on a good defense case. McGee called Swano on the evening of the 26th to inform him the fix was off. The next morning Maloney told Swano that a lawyer had left a file for him in his chambers and directed a deputy sheriff to retrieve it. When Swano went to the Judge's chambers, Maloney handed Swano the file of money he had passed to McGee at the start of the trial. Hawkins and Fields were found guilty by the Judge and subsequently sentenced to death.

By at least May 1988, a grand jury proceeding was convened and Robinson, under a grant of immunity, testified about judicial bribery in general and Maloney in particular. No indictments had yet been handed down, however, and Swano continued to practice before Judge Maloney. In late 1988 or early 1989, Swano had a pretrial case conference with the Judge in his chambers. After everyone else had left, Judge Maloney asked Swano "whether or not [he] was standing tall," which Swano understood to mean was he resisting the questions of federal investigators. Judge Maloney also asked Swano if he "needed a lawyer or any sort of help." In the Summer of 1990, in a back stairway of the courthouse, Judge Maloney again asked Swano if he was "standing tall," because he had "heard that there is a lot of investigation going on." During the conversation, Swano told Maloney that he understood the government was trying to put together a tax case against him.

On June 26, 1991, Maloney was indicted by a federal grand jury and the case proceeded to trial in March 1993. The defense's theory was that Swano and Robinson had operated a scam known as "rainmaking," where the participants never pass the bribe along to the judge. The government, however, rebutted this theory with evidence of Maloney's financial records which indicated that he extensively used money orders to hide the fact that he was spending more money than he received from all legitimate sources. On April 16, 1993, the jury convicted Maloney on all counts.

After the verdict was reached in this case, three separate district judges in the Northern District of Illinois held that William Hogan, one of the prosecutors in this case, had suppressed material information in the cases before them and ordered new trials. *See United States v. Boyd*, 833 F. Supp. 1277 (N.D. Ill. 1993), *aff'd*, 55 F.3d 239 (7th Cir. 1995); *United States v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993); *United States v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993). All of these cases involved the use of testimony of cooperating members of the El Rukn organization in prosecutions of the El Rukns for various

crimes. Because two of the cooperating El Rukn witnesses, Earl Hawkins and Derrick Kees, also testified in this case, Maloney moved for a new trial. The district court, however, denied this and all other post-trial motions, ruling that the significance of the El Rukn testimony in this case was markedly different than in the El Rukn trials. Maloney filed a timely notice of appeal and we have jurisdiction under 28 U.S.C. § 1291.

II.

Maloney's argument on appeal is somewhat convoluted. According to Maloney, the prosecution's knowing use of perjured testimony and suppression of material impeachment evidence regarding the El Rukn witnesses prevented the jury from properly evaluating whether Judge Maloney returned the Hawkins/Field bribe, which was racketeering act five, on June 19th, 1986 or on June 27th, 1986. This issue appears insignificant given racketeering act six, the obstruction of justice activity in 1988 and 1990. According to Maloney, however, it becomes material in determining if the government met RICO's five-year statute of limitations if we also agree with one of two further arguments: (1) Maloney withdrew from the conspiracy when the bribe was returned; or (2) even if Maloney did not withdraw at that time, the obstruction of justice activity in 1988 and 1990 was insufficient to extend the conspiracy past the last aborted bribe. Agreeing with one of these two arguments is also a precondition to accepting Maloney's attacks on the statute of limitations instructions and the application of the Sentencing Guidelines. Finally, Maloney contends that the instruction on the RICO interstate commerce requirements, and the introduction of evidence on the Chow and Rosario bribes, were both erroneous. This house of cards, precarious on its face, falls flat upon closer analysis.

A. Prosecutorial Misconduct

Maloney contends that during his trial the prosecution knowingly used false testimony and violated his right un-

der *Brady v. Maryland*, 373 U.S. 83 (1963) to be shown exculpatory evidence that is in the prosecution's possession. In reviewing the denial of a motion for a new trial based upon such allegations, we defer to the district court's judgment as to whether the evidence wrongfully withheld by the government might if disclosed have changed the outcome of the trial. When this question revolves on a pure issue of law, our review is *de novo*. *Boyd*, 55 F.3d at 242.

In order to receive a new trial for either the knowing use of false testimony or the suppression of exculpatory evidence, Maloney must establish that the evidence was "material," that is, that "there is a reasonable probability that, had it not been for the improprieties, the defendants would have been acquitted."[3] *Id.* at 245. "A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Kyles v. Whitley*, 115 S. Ct. 1555, 1566 (1995). Maloney alleges government improprieties with respect to the testimony of Cooley, Swano and the El Rukn witnesses, Hawkins and Kees.

1. Cooley

Maloney claims that the prosecution suppressed a statement Cooley made in his first meeting with the government. He reportedly said that he "didn't have to bribe judges because he was with the First Ward, and when you were with the First Ward, everybody knew what was supposed to happen." According to Maloney, this statement rebutted his allegations of bribery in the Chow case. Cooley admitted at trial, however, that he "was not fully

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[3] As for the alleged *Brady* violations, the district court assumed without deciding the question that the evidence was exculpatory and suppressed by the prosecution. As to the allegations of false testimony, the district court did note in passing that some of the testimony was not false, but it did not elaborate on the basis for these findings. Thus, we will limit our discussion to the basis upon which the district court did rule—the lack of materiality.

honest with them when [he] first started talking to them," thus explaining any inconsistency between his trial testimony and his prior statements. Furthermore, in view of the tapes of conversations between Cooley and Marcy confirming the existence of a fix, and the jury's findings that at least two other predicate acts occurred, it was not an abuse of discretion for the district court to find that this suppression was not material to the outcome of the case.

2. Swano

The prosecution allegedly withheld statements by one of Swano's former clients that revealed that Swano had told this client in late 1991 to lie on his habeas petition. While the suppression of such impeachment evidence can give rise to a *Brady* violation, *see Kyles*, 115 S. Ct. at 1565 (citing *United States v. Bagley*, 473 U.S. 667 (1985)), it must be more than mere cumulative impeachment. *United States v. Kozinski*, 16 F.3d 795, 819 (7th Cir. 1994). Because Swano admitted that he took witness recantation statements while suspecting that the witnesses had been intimidated into making the statements, as well as taking statements with full knowledge of their falsity, such evidence would have been merely cumulative and the district court did not abuse its discretion in so finding.

3. El Rukn witnesses

According to the evidence introduced in other cases, William Hogan and the United States Attorney's Office for the Northern District of Illinois facilitated drug usage, sexual liaisons, and extensive personal phone calls, by cooperating witnesses from the El Rukn organization, including Hawkins and Kees. *See, e.g., Boyd*, 833 F. Supp. at 1296, 1324. This evidence of Hawkins' and Kees' post-incarceration criminal activity and receipt of benefits was not disclosed to the defense, nor was it fully testified to at trial. The district court, however, found that such evidence, even assuming it included false testimony and went beyond the realm of cumulative impeachment, was not material given the nature of Hawkins' and Kees' testimony. Because neither Hawkins nor Kees testified that

they ever saw Swano pass the money along to Judge Maloney, or even his bagman, McGee, the El Rukn testimony was entirely consistent with the defense's "rainmaking" theory.

Maloney responds that the suppressed evidence and borderline false testimony were significant in relation to Hawkins' testimony regarding what Swano told him about the return of the bribe and whether this conversation took place on the 19th or the 27th of June.[4] Under the prosecution's direct examination, Hawkins testified that Swano told him on June 19th that Judge Maloney had returned the bribe. The prosecution attempted to impeach this testimony with a prior inconsistent statement Hawkins made before trial. According to the government, Hawkins had told them earlier that Swano had merely stated on June 19th that the Judge wanted to give the money back, not that he already did. Maloney theorizes that if the jury had known how beholden Hawkins was to the prosecution, it would have inferred that his prior inconsistent statement that the bribe was returned on the 27th was an attempt to tell the prosecution what it wanted to hear. Under this argument, if the jury had discounted his prior inconsistent statement, it would have found the action to be time-barred. Maloney, however, makes a number of questionable assumptions in reaching this conclusion.

Initially, the argument assumes that the evidence of drug usage and government favors would have changed the impact of Hawkins' testimony in Maloney's favor. Hawkins' testimony on direct was that the bribe was returned on June 19th. Although the government impeached

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[4] As to Kees, Maloney asserts that further impeachment would have tainted his translation of the El Rukn "code" on the surveillance tapes. Thus, when Kees inserted "bagman" into a few translations where his predecessor had not, the jury might have inferred this was done to please the prosecution. Maloney, however, makes little attempt to point out the materiality of such a discovery. He only makes a tangential leap to how this would have affected Hawkins' testimony.

this testimony with a prior inconsistent statement that the money was returned on the 27th, the defense rehabilitated it on cross-examination and recross when Hawkins admitted that he had testified to the return being on the 19th in trials dating back to 1987 and he admitted that Swano told him the bribe was returned right before Anthony Sumner, a former El Rukn, testified, which was on the 19th. While it is possible the suppressed evidence would have bolstered Maloney's case, it is equally possible that Hawkins would have appeared to be a drug addict who could not be counted on to remember exact dates or conversations in any event. Maloney speculates that if Hawkins' testimony about the return being on the 27th was discredited, Swano's testimony would go uncorroborated and unbelieved on that and all other subjects. That ultimate result is a fairly substantial stretch; it is perhaps more likely that if Hawkins' memory of dates became discounted altogether, then there would have been no one left to support Maloney's basis for the statute of limitations defense. There is no reasonable probability that disclosure of the information would have resulted in Maloney's acquittal on statute of limitations grounds.

Even if the suppressed evidence would have caused the jury to believe the bribe was returned on June 19th, it is still not material unless Maloney either withdrew from the conspiracy when the bribe was returned, or his later acts of witness tampering are insufficient to extend the conspiracy for statute of limitations purposes. Given our resolution of these two issues below, we do not find that the district court abused its discretion or committed legal error by denying Maloney's motion for a new trial.

B. Withdrawal

Maloney asserts that the district court erroneously refused to read his withdrawal instruction despite the evidence that the Hawkins bribe was returned. "Generally, a defendant is entitled to an instruction on any defense recognized in the law and supported by sufficient evidence

to allow a reasonable jury to find in the defendant's favor." *United States v. Starnes*, 14 F.3d 1207, 1210 (7th Cir.), (quoting *United States v. Schweihs*, 971 F.2d 1302, 1322 (7th Cir. 1992)), *cert. denied*, 114 S. Ct. 2717 (1994). We must decide *de novo* the question of whether Maloney introduced sufficient evidence to allow the jury to find, in accordance with the applicable law, that he withdrew from the conspiracy. *United States v. Casanova*, 970 F.2d 371, 374 (7th Cir. 1992). In making this determination, we must remember that withdrawal requires an affirmative act on the part of the conspirator. He must either confess to authorities, or "communicate to each of his conspirators that he has abandoned the conspiracy and its goals." *United States v. Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994). Mere inactivity is not sufficient; the conspirator must "affirmatively renounce[ ] the goals of the criminal enterprise," *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993), by taking steps to "defeat or disavow the conspiracy's purpose." *Sax*, 39 F.3d at 1386.

Maloney asserts that the return of the Hawkins bribe was an affirmative act inconsistent with the conspiracy's purpose. This, however, ignores the conditional nature of the bribe and the circumstances surrounding it. Many indictments and convictions of judges had already occurred at this time as a result of the Greylord investigation. According to Swano, McGee told him that Judge Maloney agreed to accept the $10,000 bribe conditional upon Swano putting on "a good [defense] case." (Tr. 2571). Swano elaborated on what the members of the conspiracy understood this to mean in the instant case:

> The judge was worried about looking bad on a serious double-murder case like this. And I had to have the witnesses together and I had to do the case the way I described it to him; that the state had a weak identification case; that we had nullified Sumner and that we had, in fact, the eyewitnesses that would contradict the testimony of the state's witnesses. (Tr. 2571)

Swano emphasized "it wasn't a hundred percent guarantee. We had to put on a good defense." (Tr. 2586). This is what he told the El Rukns when he explained the fix to them. Thus, when McGee called to end the fix, he explained that "the State witnesses were too good, and the case was going too good for the State." (Tr. 2669). Several witnesses testified that the presence of FBI agents in the building and the courtroom during Hawkins' trial was obvious and a clear indication that the case was being closely monitored for a possible fix. Thus, the threshold standard for the appearance of propriety was raised. When Swano failed to effectively rebut the state's case, the fix was called off for good. According to Hawkins, Swano explained that "the case was too hot and he didn't want to go through with it no more . . . that somebody had leaked it—somebody in the organization had leaked it to the FBI." (Tr. 1559-60). There was no evidence introduced that Maloney would be unreceptive to future bribes; the only evidence at all on the matter revealed merely that this bribe under these circumstances did not comport with the conspiracy's objectives and criteria for the fixing of cases. Maloney's return of the bribe was therefore more akin to a deal gone sour than an affirmative attempt to defeat the purposes of the conspiracy.[5] In *United States v. Pofahl*, 990 F.2d 1456, 1484 (5th Cir.), *cert. denied*, 114 S. Ct. 266, *and cert. denied*, 114 S. Ct. 560 (1993), a conspirator was scheduled to go to Guatemala to help arrange a shipment of drugs. After learning that a co-conspirator had been arrested, the conspirator can-

[5] The dissent contends that the jury might have reached a different conclusion had it been armed with the evidence of prosecutorial misconduct. Hawkins only changed his testimony as to the date the bribe was returned. Impeachment of his testimony, therefore, would not create evidence establishing Maloney's unwillingness to accept future bribes. Moreover, since it was Maloney's burden to provide such evidence, it would have been impermissible for the jury to infer it from the return of one bribe in the middle of a case or from the government's failure to provide evidence of additional bribes thereafter.

celed his scheduled trip. He argued that this was an affirmative act to withdraw from the conspiracy. The court disagreed, holding that "Nunn's decision to cancel his trip to Guatemala in the face of possible arrest is hardly an affirmative action to defeat the conspiracy." *Id.* It was an attempt to evade detection by canceling an act which was supposed to be in furtherance of the conspiracy, but this cannot equate to a withdrawal. By the same token Maloney may have canceled a bribe intended to be in furtherance of the RICO and extortion conspiracies, but this did not withdraw him from those conspiracies.

Maloney counters that the absence of any evidence of bribes after the return of the Hawkins bribe confirms that this was intended to signal a withdrawal. He admits that the inactivity itself cannot signal a withdrawal, *see Sax*, 39 F.3d at 1386, but argues that it evidences his intent to withdraw when the bribe was returned. This ignores the intermittent character of the conspiracy. After the Greylord investigation became public knowledge in 1983, the conspirators waited almost three years before attempting another bribe. As long as Judge Maloney remained on the bench, "the central criminal purpose" of the conspiracy, to fix cases whenever feasible, had not yet ended or been accomplished. *United States v. McKinney*, 954 F.2d 471, 475 (7th Cir.), *cert. denied*, 113 S. Ct. 662 (1992). After the aborted Hawkins bribe, Swano continued to practice before Judge Maloney, and McGee and Maloney continued to meet. Nothing distinguished this post-Hawkins bribe inactivity from the post-Jones bribe inactivity. Thus, it was not error to deny Maloney's proposed withdrawal instruction.

C. Obstruction of Justice

Maloney raises four arguments in support of reversing his obstruction of justice conviction under 18 U.S.C. § 1503 or limiting the extent to which the obstruction of justice count can be used in conjunction with the other counts: (1) it was based upon insufficient evidence; (2) the jury

was given an improper instruction on the issue; (3) the alleged conduct is not actionable under § 1503; and (4) the obstruction of justice conviction is insufficient to extend the RICO conspiracy for statute of limitations purposes. We will address each argument in turn.

1. Sufficiency of the Evidence

Section 1503 prohibits a person from endeavoring to obstruct or impede the "due administration of justice." To establish a violation of this section, courts require the government to establish that the defendant knew of a pending judicial proceeding and intended to impede its administration. *See United States v. Aguilar*, 115 S. Ct. 2357, 2362 (1995); *United States v. Edwards*, 36 F.3d 639, 645 (7th Cir. 1994). Maloney argues that the evidence failed to establish either the existence of a pending judicial proceeding or his knowledge of it. We will reverse a conviction for insufficient evidence only if, after viewing the evidence in the light most favorable to the government, it is determined that no rational jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Brandon*, 50 F.3d 464, 467 (7th Cir. 1995).

There was substantial, unrebutted, evidence introduced to establish the existence of a pending judicial proceeding and Maloney's knowledge of it. Robinson stated that on May 5, 1988, before Maloney's first "standing tall" conversation with Swano, he testified before the grand jury and was asked questions about his passing of bribes to many specific judges, including Judge Maloney. In 1989, Robinson was summoned to again appear before the grand jury to testify on the same subject. On February 21, 1989, IRS investigator Dennis Czurylo specifically informed Maloney that he was the subject of a grand jury investigation and served him with subpoenas issued under the authority of this grand jury. Czurylo also testified that he served a total of approximately 300 grand jury subpoenas

in his investigation of Judge Maloney.[6] IRS Agent Rick Kozma testified that he was brought into the grand jury investigation of Maloney in September of 1989 to aid Czurylo in evaluating the information they received from these subpoenas. The owner of the Park West Currency Exchange and a representative of an investment advisory firm both testified to having received subpoenas for information during this period. With the wide sweep of this grand jury investigation, it was clear that Maloney was aware it was pending when he spoke with Swano in the summer of 1990. In fact, Swano told him at the time that "I hear they are trying to put a tax case on you." (Tr. 2765). Finally, Roby testified that in August of 1990, he was served by the FBI with a subpoena to appear before the grand jury to testify about his allegations that his case before Judge Maloney had been fixed, thus indicating that the grand jury proceeding was indeed still pending when Maloney had his second "standing tall" conversation with Swano. It is well established that investigations undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute "the due administration of justice" under § 1503. *United States v. McComb*, 744 F.2d 555, 561 (7th Cir. 1984).[7]

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[6] Maloney argues that Czurylo's investigation was not clearly in aid of the grand jury investigation. *Cf. United States v. Ryan*, 455 F.2d 728 (9th Cir. 1972) (conviction reversed because of transparent use of grand jury subpoenas in aid of unrelated IRS investigation). There was ample testimony, however, that Agent Czurylo was conducting a cash flow analysis he had used to testify in the trials of several other judges who were charged with taking bribes and thus was clearly in aid of the grand jury investigation.

[7] The defense asserts that Maloney's alleged conversation with Robinson where he warned him that Swano might be wearing a wire evidences a concern about law enforcement rather than a grand jury. This distinction is part of Maloney's meritless argument that Count IV of his indictment should have been dismissed for failing to allege the existence of a pending judicial proceeding. The indictment specified the existence of a federal law enforce-

(Footnote continued on following page)

2. Jury Instructions

Maloney contends that the district court committed reversible error in its charge to the jury on the obstruction of justice count. Although the court gave the Seventh Circuit pattern jury instruction for obstruction of justice under § 1503,[8] it added its own supplemental instruction. This instruction stated that "[f]or purposes of Racketeering Act 6 and Count Four, the government need not prove that an official proceeding was actually pending or about to be instituted at the time of the offense." The government concedes that this was not an accurate statement of the law, but argues that any error was harmless.

The Supreme Court's most recent pronouncement on the harmless error standard for jury instructions came in *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081 (1993). In holding that an erroneous reasonable doubt instruction could never constitute harmless error, the Court distinguished its case from erroneous jury instructions which erect a presumption about an element of the offense. *Id.* at 2082. Thus, the Court's decision was consistent with the holding of *Rose v. Clark*, 478 U.S. 570, 580 (1986), where the jury was erroneously instructed that malice,

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[7] *continued*

ment investigation, which is sufficient if the investigation is undertaken "to secure a presently contemplated presentation of evidence before the grand jury." *McComb*, 744 F.2d at 561. In any event, the conversation with Robinson took place in late 1986, long before the period when the obstruction of justice activity occurred.

[8] That charge provided as follows:

Defendant Thomas J. Maloney is charged in Racketeering Act 6(A) and 6(B) and in Count Four with endeavoring to obstruct the due administration of justice. To sustain these charges, the government must prove the following propositions:

First, that defendant Maloney endeavored to obstruct the due administration of justice; and

Second, that defendant Maloney's acts were done knowingly and corruptly, that is, with the purpose of impeding the due administration of justice.

an element of the offense of second degree murder, could be presumed from the existence of the killing unless this presumption was rebutted by the defendant.

> '[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt.' *Rose v. Clark*, 478 U.S. 570, 580 (1986). And when the latter facts 'are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed.' *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, concurring in judgment).

Sullivan, 113 S. Ct. at 2082. In this situation, a reviewing court may find little difficulty in concluding that the presumption played no part in the jury's determination of the defendant's guilt beyond a reasonable doubt.

We had occasion to apply *Sullivan*'s harmless error standard for instructional errors in *United States v. Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994), *cert. denied*, 116 S. Ct. 63 (1995). *Parmelee* involved the violation of a section of the immigration laws which prohibited a person from knowingly and willfully transporting an illegal alien within the United States. Although the district court instructed the jury that it must find that the defendant knew the alien he was transporting had entered the country illegally, it did not instruct the jury that it must find that the defendant did so willfully, in order to further the aliens illegal entry. *Id.* at 391. Although we recognized that "in theory" a jury could conclude that an individual knowingly but not willfully transported illegal aliens, we found that under the factual circumstances of the case, there was unrebutted evidence of the defendant's mental state in transporting the alien. *Id.* at 393. Thus, the instructional error was harmless. "[A] rational jury, which found that the defendants knew the aliens were illegal, also would have necessarily found that the defendants knew their activity furthered the aliens' violation of the law." *Id.*

The instant case is also well-suited for a harmless error determination under *Sullivan*. The district court through its supplemental instruction essentially permitted the jury to presume the existence of a pending judicial proceeding if it found an attempt to obstruct the due administration of justice. In order to find Maloney guilty of violating § 1503 under the district court's erroneous instruction, though, the jury still had to find beyond a reasonable doubt that he made one or both of the statements to Swano in an attempt to obstruct justice. Although in theory a jury under this instruction could convict an individual for obstruction of justice without any evidence of a pending judicial proceeding, the factual circumstances of this case suggest that the actual verdict was not so influenced. *See Parmelee*, 42 F.3d at 393. The factual finding of obstruction of justice is so closely related to the ultimate and unrebutted fact of the existence of a pending grand jury proceeding that the error is harmless. For instance, Swano testified that after receiving Maloney's "standing tall" warning in the summer of 1990, he informed Maloney of his knowledge of the government's attempt to make out a tax case against him. Maloney therefore had knowledge that his statement to Swano could reasonably interfere with an investigation by the IRS. The only evidence introduced at trial of a "tax case," however, was the unrebutted testimony of IRS Agents Dennis Czurylo and Rick Kozma that they were investigating Maloney's financial records in aid of the grand jury investigation and had told Maloney of this fact. A finding that Maloney endeavored to obstruct the tax case against him is the same as a finding that he endeavored to obstruct the pending grand jury proceeding because the tax investigation was being pursued in aid of the grand jury investigation. Furthermore, it was unrebutted that a grand jury proceeding was pending between 1988 and 1990. There was no testimony that any investigation which took place during the period was somehow independent of the grand jury's au-

thority.[9] Thus, because the jury found that Maloney endeavored to obstruct the due administration of justice, and because no rational jury could have failed to find the existence of a pending grand jury proceeding during Maloney's attempts to obstruct justice, then the instructional error could not have "contribute[d] to the jury's verdict of guilty." *Parmelee*, 42 F.3d at 393; *see Pope v. Illinois*, 481 U.S. 497, 503 (1987).

3. Scope of § 1503

Maloney argues that the alleged obstruction of justice in this case, witness tampering, is not actionable under § 1503. In 1982, Congress enacted the Victim and Witness Protection Act ("VWPA") and removed from § 1503 all references to witnesses. Coupled with the enactment of § 1512, which deals with witness intimidation and harassment, the Second Circuit held that Congress intended to remove witnesses entirely from the scope of § 1503, including from the omnibus clause. *See United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984). This court, however, rejected such an "implied repeal" argument in *United States v. Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986), holding that "witness tampering may still be charged under § 1503" despite the enactment of the VWPA and § 1512.

Maloney responds that the 1988 amendments to the VWPA, which extended protection to witness persuasion as well as intimidation, undercut the rationale of *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984), cited with approval by *Rovetuso*, 768 F.2d at 824, for the co-

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[9] We have long recognized "that it is usually the task of the United States Attorney's office, with the help of such agencies as the FBI, to amass and coordinate the evidence to be presented to a grand jury." *McComb*, 744 F.2d at 561. Thus, the jury could only infer that any attempt by Maloney to impede an FBI or U.S. Attorney's office investigation during the pendency of a grand jury proceeding was the same as an attempt to impede the pending grand jury proceeding itself.

existence of witness tampering under both §§ 1503 and 1512. The Second Circuit, following its position in *Hernandez*, disparaged these cases on similar grounds in *United States v. Masterpol*, 940 F.2d 760, 763 (2d Cir. 1991). This position, however, is still a minority one. Other circuits have continued to fall in line with *Rovetuso*'s holding after the 1988 amendments. *See, e.g., United States v. Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1348 (1993); *United States v. Kenny*, 973 F.2d 339, 342-43 (4th Cir. 1992). In *Kenny*, the court pointed out the correctness of this approach:

> The omnibus clause of 18 U.S.C. § 1503 . . . clearly encompasses acts "that obstruct, or impede, the due administration of justice." The fact that § 1512 more specifically addresses improper conduct involving a witness does not preclude application of § 1503. The existence of a more narrowly tailored statute does not necessarily prevent prosecution under a broader statute, so long as the defendant is not punished under both for the same conduct.

Id. at 342. We see no reason to depart from this analysis and our precedent on the question.

4. Ability to Extend the Conspiracy

Maloney's last argument with respect to the obstruction of justice count is that the obstruction of justice charges could not have extended the RICO conspiracy for statute of limitations purposes. He raises a number of points in support of this position.

(a) Maloney contends that the obstruction acts were post-conspiracy attempts at concealment which could not have extended the conspiracy for statute of limitations purposes under *Grunewald v. United States*, 353 U.S. 391, 402 (1953). In *Grunewald*, three individuals had fraudulently succeeded in obtaining "no prosecution" rulings from the Bureau of Internal Revenue in 1948 and 1949 for their tax evasion cases. Subsequent activities of the conspirators were directed at preventing detection of the irregularities

in the manner in which they had secured the favorable rulings. *Id.* at 395. The Court held that these subsequent activities could not be used to extend the original conspiracy for statute of limitations purposes because the main objective of the conspiracy had long been accomplished. *Id.* at 398. The Court emphasized, however, that "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been obtained, for the purpose only of covering up after the crime." *Id.* at 405; *see Ingram v. United States*, 360 U.S. 672, 679 n.10 (1959). Maloney suggests that *Grunewald* controls this case.

Unlike *Grunewald*, however, the conspiracy's main criminal objective was never "finally attained" in this case. *United States v. Lash*, 937 F.2d 1077, 1082 (6th Cir.), *cert. denied*, 502 U.S. 949 (1991), *and cert. denied*, 502 U.S. 1061 (1992). A conspiracy ends when its main criminal objective has been accomplished or abandoned, *McKinney*, 954 F.2d at 475, i.e., "when the design to commit substantive misconduct ends." *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1024 (7th Cir. 1992). A conspiracy to murder, for example, ends when the murder is committed. *McKinney*, 954 F.2d at 475. Unlike many of the Court's concealment cases "where the object of the conspiracy was a discrete criminal act, here we deal with a crime that had no specific terminating event." *United States v. Mackey*, 571 F.2d 376, 383 (7th Cir. 1978). "Where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated. . . ." *United States v. Elwell*, 984 F.2d 1289, 1293 (1st Cir.) (only event occurring between the last drug transaction and the indictment a year and a half later was an endeavor to obstruct justice), *cert. denied*, 113 S. Ct. 2429 (1993); *United States v. Coia*, 719 F.2d 1120, 1125 (11th Cir. 1983) (quoting *United States v. Mayes*, 512 F.2d 637, 642 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975)), *cert. denied*, 466 U.S. 973 (1984); *United*

States v. Hamilton, 689 F.2d 1262, 1268 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983); *cf. United States v. Grubb*, 11 F.3d 426, 440 (4th Cir. 1993) (although only an endeavor to obstruct justice occurred in the period before indictment for bribery and fraud, court found that "such activity was likely to continue for as long as Grubb remained in authority in Logan County.").[10] In the instant case, the main criminal objective, to fix cases whenever feasible, was neither accomplished nor abandoned as long as Judge Maloney remained on the bench, Swano continued to practice before him, and McGee continued his friendship with him.[11] Concealment, therefore, was an overt act in furtherance of the conspiracy's main objectives. *See United States v. Eisen*, 974 F.2d 246, 269 n.8 (2d Cir. 1992) ("acts or statements designed to conceal an ongoing conspiracy are in furtherance of that conspiracy"), *cert. denied*, 113 S. Ct. 1619 (1993). Maloney's statements to Swano helped to preserve his position on

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[10] The fundamental flaw in the dissent's argument with respect to the obstruction of justice count is the failure to recognize that a conspiracy contemplating a continuity of purpose and a continued performance of acts is presumed to exist until affirmatively proven otherwise. As long as the conspiracy is presumed to exist, acts of concealment are presumed to occur *during the period* of the conspiracy and are not introduced for the purpose of extending the life of the conspiracy.

[11] Maloney suggests that the return of the bribe constituted an abandonment of the objectives of the conspiracy. As our discussion of withdrawal indicates, however, the bribe was canceled under the terms of the agreement in which it was made and its return did not signal a reluctance to fix future cases in the event conditions were suitable. Maloney offered no other evidence to affirmatively show that the conspiracy ended. Just as during the inactivity between the Jones and Hawkins bribes, the conspirators continued to associate, they maintained their positions in the court, and none of them communicated a desire to abandon the conspiracy either to the others or to the government. "[T]he defendants utterly failed to affirmatively prove either that the conspiracy had been abandoned or that any of them had withdrawn. Such affirmative defenses are strict." *Hamilton*, 689 F.2d at 1269.

the bench—the essential ingredient in the conspiracy's ability to fix cases. *See United States v. LeFevour*, 798 F.2d 977, 982 (7th Cir. 1986) ("the acts of concealment further[ed] the objects of the conspiracy—obtaining money—and result[ed] in lengthening its duration"); *United States v. Xheka*, 704 F.2d 974, 986 (7th Cir.), *cert. denied*, 464 U.S. 993 (1983); *United States v. Howard*, 770 F.2d 57, 60-61 (6th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986). Thus, *Grunewald* does not exclude the obstruction of justice acts from the RICO conspiracy for statute of limitations purposes.

(2) Maloney argues that his obstruction did not conduct the RICO enterprise through a pattern of racketeering activity under *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 (1993). According to the defense, in Maloney's endeavor to obstruct, unlike his taking of bribes, he was attempting to conduct his "*own* affairs" rather than the affairs of the enterprise, i.e., the Circuit Court. *Id.* Citing this court's holdings in *United States v. Crockett*, 979 F.2d 1204, 1213 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1617 (1993) and *Overnite Transp. Co. v. Local No. 705*, 904 F.2d 391, 393 (7th Cir. 1990), the defense argues that Maloney's endeavor to obstruct was not a function of his position on the court and had no effect upon it.[12]

The facts of this case belie Maloney's contentions. During both conversations with Swano, Maloney was an active judge of the Circuit Court of Cook County who at least co-operated or co-managed the enterprise with the other judges. *See Grubb*, 11 F.3d at 438-39 (citing *Reves*, 113 S. Ct. at 1172). The first conversation followed a case conference in Judge Maloney's chambers which Maloney had arranged, and, under the authority of the Circuit Court, Swano was bound to attend. There was some testimony

[12] The government suggests that the "facilitation and effect" test enunciated in these cases may not have survived *Reves*. We need not reach that question, however, because Maloney's actions satisfied the standard in either instance.

that Judge Maloney may have had most such case conferences in open court during this time, suggesting that he used his position in the court to secure a more private meeting. The second conversation also took place at the courthouse, which the Circuit Court required Swano to frequent as part of his representation of clients. Instead of calling Swano or arranging a meeting elsewhere, Judge Maloney chose to confront Swano at the courthouse where it would attract less suspicion for them to be seen together. In addition, Maloney's actions certainly had an effect on the enterprise, in that they helped preserve his position on the bench and prolong the possibility of fixing cases. Thus, in both instances, Maloney conducted the affairs of the enterprise when he attempted to obstruct justice.

(3) Maloney's last argument with respect to the obstruction count is that the conversations with Swano were not part of the RICO pattern. Under the "continuity plus relationship" test, a pattern is established by proving that "the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Maloney suggests neither element was present.

Maloney first argues that the obstruction acts were not sufficiently related, because they were not "committed somewhat closely in time to [the other predicate acts], involve the same victim, or involve the same type of misconduct." *See Vicom, Inc. v. Harbridge Merchant Serv., Inc.*, 20 F.3d 771, 779 (7th Cir. 1994), (quoting *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986)). Time alone does not defeat the pattern. "[A] three-year gap between the commission of predicate acts does not in and of itself amount to a failure to prove a pattern of racketeering activity." *United States v. Church*, 955 F.2d 688, 699 (11th Cir.), *cert. denied*, 113 S. Ct. 233 (1992). In fact, the gap is consistent with the time between the Jones and Hawkins bribes, reflecting the ongoing relationship of the conspirators. Furthermore, criminal acts are related if they "have the same or similar purposes,

results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.*, 492 U.S. at 240. Under this relatively broad standard, the bribes are clearly related to their concealment. The endeavor to obstruct was an attempt to maintain Judge Maloney's position to fix future cases. It had the same underlying purpose as the other predicate acts and involved the same participants and the same ultimate victim—the integrity of the criminal justice system. *Cf. Grubb*, 11 F.3d at 440 (witness tampering in an attempt to conceal bribe was sufficiently related to the bribe itself for RICO pattern requirement).

Maloney also contends that the witness tampering occurred too long after the conspiracy to establish continuity. This, however, assumes that the conspiracy had ended at the last bribe. As we explained previously, there was ample evidence that the conspiracy was still on as long as Judge Maloney remained on the bench. *Id.* Thus, because the conspiracy was a long-term activity without "a natural end point," it certainly satisfies the continuity requirement. *Shields Enterprises, Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1295 (7th Cir. 1992). Moreover, both the bribes and the concealment were "a regular way of conducting defendant's ongoing legitimate business." *H.J. Inc.*, 492 U.S. at 243. In addition to the bribes, Judge Maloney changed his bagman from Robinson to McGee, warned Robinson not to speak with Swano because he might be wearing a wire, spoke in code, and engaged in money laundering. Swano also told Cooley about Paul Baker, a possible government informant against them, and spoke to Hawkins concerning the possibility he might testify against him before the grand jury. Thus, there was sufficient evidence of a RICO pattern.[13]

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[13] Thus, because the obstruction of justice count is substantively valid, and because the acts of obstruction were part of an ongoing conspiracy which straddled the date in which the Sentencing Guide-

(Footnote continued on following page)

D. Statute of Limitations Instruction

The district court instructed the jury that Maloney could not be found guilty of the racketeering charge "unless you find that he committed one of the racketeering acts set forth in Count Two within five years of the return of the indictment which occurred on June 26, 1991. Thus, to find defendant Thomas J. Maloney guilty", the government must prove that he committed Racketeering Act 5 and/or Racketeering Act 6. Maloney argues that the use of the word, "thus," and its placement in the instruction, implied that both Act 5 and Act 6 fell within the limitations period, an issue in doubt with respect to Act 5. Further clouding the issue, according to Maloney, was that the court read a standard "on or about" instruction early on in its charge to the jury.[14] Neither of these arguments have merit. The statute of limitations instruction accurately reflected that one of the acts must have occurred no longer than five years before June 26, 1991. The district court's use of the term "thus" served to direct the jury's attention to Acts 5 and 6, the only acts which could possibly come within the limitations period. Any doubt the jury had after hearing the general "on or about" instruction was removed upon hearing this specific statute of limitations instruction and upon hearing it reread in answer to a jury question. Moreover, even if there was any error, it was harmless in light of the jury's verdict of guilty on Act 6, which was well within the limitations period, and our conclusion that this verdict should be

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[13] *continued*

lines were enacted, the district court was correct in applying the Guidelines to Maloney's sentence. *See United States v. Morgano*, 39 F.3d 1358, 1369 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2559 (1995).

[14] This instruction read as follows:

> The indictment charges that the offense was committed "on or about" particular dates listed in each count. The government need only establish that the offense was committed on a date reasonably near the date charged.

allowed to stand. *See United States v. Neuroth*, 809 F.2d 339, 341-42 (6th Cir.), *cert. denied*, 482 U.S. 916 (1987) (finding that an "on or about" instruction was harmless error despite the presence of an alibi defense).

E. RICO Interstate Commerce Instruction

Relying on *United States v. Robertson*, 115 S. Ct. 1732 (1995) and *United States v. Lopez*, 115 S. Ct. 1624 (1995), Maloney submits that the district court erred when it instructed the jury that the government must prove "that the Circuit Court of Cook County engaged in interstate commerce or its activity affected interstate commerce. . . . interstate commerce is affected if you find that the Circuit Court of Cook County has any impact, regardless of how small or indirect, on the movement of any money, goods, services, or persons from one state to another." According to Maloney, this instruction was erroneous in two respects. First, it impermissibly broadened the indictment by allowing the jury to find that the Circuit Court either engaged in or affected interstate commerce, while the indictment only charged that the Circuit Court affected interstate commerce. Second, the jury should have been charged with finding that the court "substantially affects" interstate commerce.

Maloney, however, did not raise these objections before the district court in accordance with Fed. R. Crim. P. 30.[15] This court has often held that we may review for plain error any instructions which were not challenged below. *See United States v. Boyles*, 57 F.3d 535, 541 (7th Cir. 1995); *United States v. Waldemer*, 50 F.3d 1379, 1386 (7th Cir.), *cert. denied*, 63 U.S.L.W. 3891 (1995); *United States v. Baker*, 40 F.3d 154, 161-62 (7th Cir. 1994), *cert.*

[15] Rule 30 provides in pertinent part: "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."

denied, 115 S. Ct. 1383 (1995); *United States v. Mounts*, 35 F.3d 1208, 1221 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1366 (1995); *United States v. Knapp*, 25 F.3d 451, 454-55 (7th Cir.), *cert. denied*, 115 S. Ct. 493 (1994). Some panels of the court, however, relying upon the distinction between forfeiture and waiver outlined in *United States v. Olano*, 113 S. Ct. 1770, 1777 (1993), have held that the failure to object to an instruction constitutes a waiver of that objection and thus plain error review does not apply. *See United States v. Espino*, 32 F.3d 253, 258-59 (7th Cir. 1994); *United States v. Lakich*, 23 F.3d 1203, 1207-08 (7th Cir. 1994). Even these latter cases, though, perhaps out of an abundance of caution, have nonetheless discussed the objection under the plain error standard. Thus, we will review Maloney's objections for plain error.

Maloney's contention that the "engages in" language in the instruction impermissibly departed from the "affects" language in the indictment is not even error, let alone plain error. It is well settled that the power to regulate matters affecting interstate commerce is broader than the right to regulate interstate commerce itself. *See Russell v. United States*, 471 U.S. 858, 859 n.4 (1985); *Scarborough v. United States*, 431 U.S. 563, 571-72 (1977). Thus, the charge that the activities of the Circuit Court of Cook County "affected" interstate commerce is presumed to include evidence that it directly participated in interstate commerce as well as evidence that its intrastate activities had an effect on interstate commerce. There was no impermissible broadening of the indictment. *United States v. Miller*, 471 U.S. 130, 138 (1985). The government presented uncontested evidence that the Circuit Court "directly engaged in the . . . acquisition of goods and services in interstate commerce," through its purchase of law books and computer equipment and thus there was sufficient justification to introduce the instruction. *Robertson*, 115 S. Ct. at 1733, (quoting *United States v. American Building Maintenance Indust.*, 422 U.S. 271, 283 (1975)).

Maloney's second argument is equally without merit. *Lopez*'s "substantially affecting" standard describes the

requirement that, "viewed in the aggregate," statutes concern activities which substantially affect interstate commerce. *Id.*, 115 S. Ct. at 1631. "Where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 1629, (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)). Unlike RICO, the statute in *Lopez* "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* It is by no means "plain" that individual activities regulated by RICO must each "substantially affect" interstate commerce. *See Robertson*, 115 S. Ct. at 1733 (questioning whether or not, under the "affecting commerce" provision in RICO, the activities of the enterprise "would have to meet" the requirement of substantially affecting interstate commerce); *United States v. Stillo*, 57 F.3d 553, 559 n.2 (7th Cir.), *cert. denied*, 64 U.S.L.W. 3287 (1995). Furthermore, even if the district court's instruction was error, Maloney made no attempt to establish that the error was prejudicial, i.e., that it "affected the outcome of the District Court proceedings." *Olano*, 113 S. Ct. at 1778. Maloney failed to allege that the government's evidence would not have survived an instruction requiring the jury to find that the Circuit Court "substantially affected" interstate commerce. Thus, we have no basis for finding plain error.

F. Chow and Rosario Cases

Maloney argues that the district court improperly admitted evidence of Racketeering Act 1, the Chow fix, and evidence of the uncharged Rosario case. He contends that the Chow case should have been dismissed from the indictment and the Rosario case was improperly used as propensity evidence. We review these contentions for abuse of discretion. *See United States v. Cichon*, 48 F.3d 269, 274 (7th Cir. 1995), *petition for cert. filed* (May 18, 1995); *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 724 (7th Cir. 1994).

1. Chow Case

Maloney first argues that the Chow case was improperly included as part of the RICO conspiracy because it involved some participants, specifically Cooley and Marcy, who did not participate in the other predicate acts. This ignores the nature of § 1962(d). "This section of RICO is capable of providing for the linkage in one proceeding of a number of otherwise distinct crimes and/or conspiracies through the concept of enterprise conspiracy." *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986); *see United States v. Gonzalez*, 921 F.2d 1530, 1540 (11th Cir.) ("The notion of 'enterprise conspiracy' . . . has made much of the old distinction between 'single conspiracy' and 'multiple conspiracy' irrelevant to RICO conspiracy charges."), *cert. denied*, 502 U.S. 827, *and cert. denied*, 502 U.S. 860 (1991). To prove a single RICO conspiracy, the government need only show that the defendant agreed to conduct the affairs of the enterprise through the commission of two predicate acts. *United States v. Ashman*, 979 F.2d 469, 485 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 62 (1993). Thus, "a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy if the defendants have agreed to commit a substantive RICO offense." *Neapolitan*, 791 F.2d at 496 n.3, (quoting *United States v. Riccobene*, 709 F.2d 214, 224-25 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983)). "So long as the alleged RICO co-conspirators have agreed to participate in the affairs of the same enterprise, the mere fact that they do not conspire directly with each other" does not convert the agreement to conduct the enterprise's affairs through a pattern of racketeering activity into multiple conspiracies. *United States v. Friedman*, 854 F.2d 535, 562 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *accord United States v. Lee Stoller Enter., Inc.*, 652 F.2d 1313, 1319 (7th Cir. 1981), *cert. denied*, 454 U.S. 1082 (1982); *United States v. Hughes*, 895 F.2d 1135, 1140 (6th Cir. 1990).

The government has certainly succeeded in establishing that Maloney agreed to conduct the affairs of the Circuit Court through several predicate acts, even though each predicate act did not involve the exact same participants. Furthermore, the facts of the instant case support the existence of a single RICO conspiracy. The common element in each predicate act was the involvement of Judge Maloney in his capacity as a Judicial Officer in the Circuit Court of Cook County and a desire of all participants to effect a "corruption of that office." *United States v. Hampton*, 786 F.2d 977, 981 (10th Cir. 1986). Moreover, Swano's willingness to pass information about a federal investigation along to Cooley and his desire to discuss his problems in the Hawkins case with Cooley indicates the kind of common goals and mutual benefit between the lawyers seeking to obtain the bribes which supports the inference of a single RICO conspiracy. *See United States v. Stephens*, 46 F.3d 587, 593 (7th Cir. 1995). Thus, Chow was properly included within the indictment.[16]

Maloney also argues that Chow was improperly included in the substantive RICO count because it was based on hearsay testimony, Cooley's rendition of Marcy's statements regarding the fix, and thus was insufficiently proven. The government, however, introduced the evidence on a non-hearsay basis as a co-conspirators' statement under Fed. R. Evid. 801(d)(2)(E).[17] Furthermore, there was other

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[16] Even if the evidence had not supported the finding of a single RICO conspiracy, Maloney has not established that this prejudiced his substantial rights so as to require reversal of the conviction. *See United States v. LeQuire*, 943 F.2d 1554, 1561 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3037 (1992).

[17] Maloney counters that this evidence could not have been admitted as co-conspirator's statements since the statements were made in 1986 and therefore could not have been in furtherance of the 1981 bribe. This assumes Maloney's first argument—that the Chow fix was a separate conspiracy. Marcy continued to be a member of the overall RICO conspiracy and his statements to Cooley on the need to conceal the Chow fix were in furtherance of the conspiracy.

evidence of the fix, including Judge Maloney's conduct during the bond hearing and trial and the requirement that Cooley add Herb Barsy, a friend of the Judge, to the defense team as a condition of the fix. Thus, Chow was properly included in Count Two and was validly relied upon during Maloney's sentencing. Any effect the evidence of this bribe had on the credibility of the evidence of the other bribes was a result of Maloney's direct participation in this fix and was not impermissible. *See Lee Stoller Enter., Inc.*, 652 F.2d at 1319; *Friedman*, 854 F.2d at 563.

2. Rosario

Finally, Maloney argues that the evidence of the uncharged Rosario bribe, ostensibly offered to prove his connection to the enterprise and the conspiracy, was unnecessary for that purpose and was therefore mere propensity evidence. Maloney suggests that it was unnecessary to establish that he was a Circuit Court judge because his status was not in dispute. During the Rosario case, however, Swano arranged a meeting with Judge Maloney to confirm that Robinson was his bagman and that he was indeed willing to fix cases. The evidence was not only offered to bolster Maloney's connection to the Circuit Court, but it was offered to establish his connection to the conspiracy to accept bribes. It was clearly admissible for this purpose. *See Neapolitan*, 791 F.2d at 506.

III.

For the above reasons, Maloney's conviction, and the district court's decision to deny his motion for a new trial, are AFFIRMED.

RIPPLE, *Circuit Judge*, dissenting.

I respectfully dissent from the affirmance of the district court's decision to deny the motion for new trial. In my view, if the jury had been permitted to hear the evidence of prosecutorial misconduct, it might well have rejected the government's submission that the conspiracy continued within the time period covered by the statute of limitations.

To fall within the statute of limitations, the conspiracy charged in this case must have continued within the five-year period before the date of the indictment. Therefore, it was incumbent upon the prosecution to establish that at least one racketeering act took place after June 25, 1986. The post-June 25, 1986 acts on which the government relies to prove the continuation of the conspiracy were the alleged return of the $10,000 bribe to Swano on June 27, 1986 (rather than on June 19, 1986), and the cover-up conversations, the "standing tall" admonition, between Maloney and Swano.[1]

1.

I cannot accept the government's submission that the jury's lack of knowledge with respect to Hawkins' relationship with the government could not have affected its evaluation of whether the money was repaid on June 19 rather than June 27. Indeed, my colleagues admit that the testimony could have made a difference in the jury's evaluation. Nor can I accept the proposition that keeping the jury in the dark with respect to this matter did not make a significant difference in the outcome.

My colleagues conclude that, even if the money was returned on June 19, as the defendant contends, that re-

[1] The government alleged that, in the summer of 1989, Maloney knew of the federal investigation of the *Hawkins-Fields* bribe and told Swano to refuse to cooperate. It further alleged that, in June or July 1990, Maloney again told Swano to refuse to cooperate.

turn could not have constituted a withdrawal from the conspiracy. In the majority's view, "Maloney's return of the bribe was . . . more akin to a deal gone sour than an affirmative attempt to defeat the purposes of the conspiracy." In my view, this is a judgment that ought to be left to the jury. Government witness Earl Hawkins first testified that the bribe money was returned on June 19; after much questioning and eventual impeachment from Assistant United States Attorney Hogan, Hawkins changed his testimony to say that Maloney *said* he would return the bribe money on June 19, but he *actually returned* it on June 27, 1986.[2] If the jury had realized that Hawkins had a very definite motive to give the government the testimony it wanted to hear, its evaluation of his testimony may well have been different.

We have recently set forth the requirements for withdrawal:

> But proving one has withdrawn from a conspiracy is no easy matter, requiring the defendant to prove he both ceased participation in the conspiracy, *United States v. DePriest*, 6 F.3d 1201, 1206 (7th Cir. 1993), and affirmatively disavowed the conspiracy's purpose, *United States v. Bafia*, 949 F.2d 1465, 1477 (7th Cir. 1991), *cert. denied sub nom. Kerridan v. United States*, [504] U.S. [928], 112 S. Ct. 1989 (1992).

United States v. Morgano, 39 F.3d 1358, 1370 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2559 (1995). It is never enough merely to cease participation (even when the conspirator was terminated from the conspiracy, as in *Morgano*). There must be an "affirmative act, such as a confession to authorities or a clear communication to co-conspirators of abandonment of the conspiracy's goals." *Id.* at 1370-71; *see also United States v. Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994) (requiring that "the conspirator must take affirmative

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[2] Testimony concerning the return of the bribe came from El Rukn gang member Earl Hawkins, a cooperating witness. *See* Tr. 1559-70, 1648-49, 1697, 1709-10.

steps to *defeat* or *disavow* the conspiracy's purpose"); *United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991) (discussing withdrawal as a "term of art in the law of conspiracy"). In this case, the jury was entitled to conclude on the basis of the evidence that Maloney had taken the affirmative act of returning the $10,000 bribe money. Such an act is certainly a communication, made to a fellow conspirator, of his abandonment of the conspiracy, and could constitute a withdrawal. There is no evidence of bribes or of case-fixing after this action, and thus no demonstration that Maloney continued to endorse the purpose of the conspiracy. *See Sax*, 39 F.3d at 1387.

A jury should be entitled to consider Hawkins' privileged treatment by the United States Attorney's Office in its evaluation of the lack of evidence of a continuation of the conspiracy.

2.

The majority also relies upon the "standing tall" admonition by the defendant to Swano as evidence that the conspiracy continued up to that point.

This reliance is dependent on the majority's view that the purpose and objective of the conspiracy was case-fixing, and that the conspirators had agreed that this activity would continue as long as Maloney was a judge. On that view, the conspiracy was neither accomplished nor abandoned as long as Judge Maloney remained on the bench, Swano continued to practice before him, and McGee continued his friendship with him. This view posits a conspiracy that is, for all practical purposes, of unlimited duration. In *Grunewald v. United States*, 353 U.S. 391 (1957), the Supreme Court distinguished "between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Id.* at 405.

> The acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended—a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord.

Id. at 406; *see also Ingram v. United States*, 360 U.S. 672, 679 n.10 (1959) ("[T]he life of the conspiracy cannot be extended by evidence of concealment after the conspiracy's criminal objectives have been fully accomplished."); *United States v. Finlay*, 55 F.3d 1410, 1415 (9th Cir.), *cert. denied*, 116 S. Ct. 193 (1995). If, as we have previously held, the concealment of records and attempts to mislead the grand jury are simply cover-up activities, rather than a continuation of the actual conspiracy, *see United States v. Roberts*, 22 F.3d 744, 750-51 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 744 (1995), then surely two brief conversations between Maloney and Swano, held a year apart, unconnected to any specific actions, cannot be considered a continuation of the conspiracy.[3] Under this theory, as long as there is the potential for a bribe, Maloney could never withdraw from the conspiracy. Given our case law, this characterization is a much too slender reed on which to base a theory of continued conspiracy. Indeed, even when we have found that conspirators "intended from the first to exert strenuous efforts to prevent discovery of the crime and of their involvement in it," *Masters*, 924 F.2d at 1368, we have recognized that efforts to conceal a conspiracy are not automatically a part of the conspiracy.

More fundamentally, even if the jury should have been permitted to reach, on the evidence before it, the conclusion that the conspiracy included the "standing tall"

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[3] In *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986), we also considered whether a cover-up conspiracy is separate from the original conspiracy (judge taking bribes). In this case the act of concealment was a note written by a coconspirator *during the period* that the judge was still taking bribes. 798 F.2d at 982. We upheld the admission of that note into evidence as an act of concealment that furthered the object of the conspiracy.

incidents, its consideration of this issue was impermissibly skewed by the absence of information concerning Hawkins' motivation to support the case of the government. Had the jury known of Hawkins' affiliation, it might have determined that the conspiracy terminated on June 19. If it had so determined, it necessarily would not have characterized the Maloney-Swano conversations as part of that conspiracy.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: November 29, 1995

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge
Honorable JESSE E. ESCHBACH, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge

No. 94-2779

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

THOMAS J. MALONEY,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 CR 477, Harry D. Leinenweber, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 15, 1996.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 94-2779 vs.

THOMAS J. MALONEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 CR 477—Harry D. Leinenweber, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant, no judge in active service* has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Ilana Diamond Rovner took no part in the consideration of the petition.

APPENDIX C

Hawkins - direct [1558-1570]

[1558] conversations with anybody about how the trial was going in your opinion?
A Yes.
Q Who did you talk to?
A Bernard Green, Roland Lewis, Thomas Bates.
Q Who were they?
A They were some more mens that was on the legal team that came to court to see how the proceedings were going.
Q When you said Thomas Bates, is this his picture, Government's Exhibit 24 (indicating)?
A Yes.
Q What about Jeff Boyd, did you talk to him at all?
A Yes.
Q Is this his picture here, Government's Exhibit Photo 25 (indicating)?
A Yes.
Q What was it that you discussed with them about how the case was going?
A They was saying that our lawyers was eating the state witnesses up, catching them in a lot of lies and inconsistencies.
Q Now, the next day, sir, the 19th of June, did you have a conversation in the morning, about 11:00 or 12:00 o'clock, before the trial actually began, again, [1559] with Mr. Swano?
A Yes.
Q Where was it that you talked to him this time?
A In the bull pen.
Q What was it that he said to you at that time, on the 19th, the third day of the trial.

MR. GILLESPIE: Judge, could we have a time for this? I mean, the time of day.

MR. HOGAN: I said around eleven or twelve or so.
BY MR. HOGAN:
Q. Is that right? Do you remember? Do you remember what time the trial started that day?
A Around 11:00 o'clock, somewhere around there.
Q Would you tell us what Mr. Swano said to you around that time.
A He said, "I got some bad news."
Q What did you say when he said that?
A I said, "What you talkin' about, man?"
Q What did he say?
A He said the judge gave him the money back.
Q What did you say to that?
A I said, "What? He did what?" He said, "He gave me the money back." I said, "What did he do that for?" He was saying that the case was too hot and he didn't **[1560]** want to go through with it no more.
Q Did he say anything else at that time?
A Yes, that somebody had leaked it—somebody in the organization had leaked it to the FBI and he didn't want to go through with the fix no more.
Q What did you say in response to all that?
A "A deal's a deal."
Q Did you say anything else?
A "Man, I told you if you didn't think you could handle it, we could have just took a jury trial. Now you got me way into a bench trial that is in process now and you can't stop it. Now you're telling me there ain't no deal."
Q What did he say to that?
A He said, "Man, the judge wanted to give me the money back. What can I do?" I said, "I don't know what you can do. You better do something."
Q Did he say why the judge—
MR. HOGAN: Well, strike that.
BY MR. HOGAN:
Q When you said, "You better do something" in response to him telling you the judge wanted to give him

the money back, did he say what it was he was going to try and do?

A He was saying he wasn't going to take the money **[1561]** back; that he was just going to let the judge keep it and he wasn't going to take the money back.

Q Did he say whether he was going to try and do anything else with respect to convincing the judge to keep the money?

A He said he was just going to try and work with him.

Q What was his demeanor like? What did he look like when he was telling you that the judge wanted to give the money back, Mr. Hawkins? How was he acting?

A Surprised, scared.

Q When you say, "scared," what do you mean by that?

A He was acting scared. Why do I think that he was scared? Because he knew who he was dealing with and he knew that I told him before we got off into it plainly, "if you ain't got this deal set in stone, we ain't got to go with it now. We can go with a jury trial." I told him that. "Now you're coming back and telling me there ain't no deal, or the deal is off, or you can't handle it and that don't even sound right, man."

Q When you say he knew who he was dealing with, what do you mean by that, Mr. Hawkins?

A He knew he was dealing with Jeff Fort and El Rukns.

Q What did that mean?

A That he should know his life was on the line.

Q Now, over the next day, that is, the 19th and the **[1562]** 20th, did you have additional conversations with Swano about whether the deal was still on or whether the judge was going to try and give the money back?

A He came back and said maybe he had overreacted, maybe he could still work with the judge or something like that.

Q Do you remember when it was that he told you that?

A The 19th.

Q And the 20th, did you have further conversations about it, as well?
A Yes.
Q Where did they take place, do you remember?
A In the bull pen, in the back.
Q About what time, do you remember?
A No.
Q What was your conversation at that time about the status of the fix?
A He said the judge had gave him the money back.
Q The judge had?
A Yes.
Q What did you say at that time?
A "Man, I don't know how you got us out here like this, man."
Q What else did he say?
A He was saying that he did everything that he could.
[1563] Q What happened after that?
A He don't know what happened. The judge gave him the money back.
Q Do you remember what happened next, after he told you that?
A We went back to court.
Q What happened when you got back?
A I got found guilty.
Q That day?
A Eventually.
Q Well, when was it, this conversation that you had with him, where he told you the judge actually gave him the money back? When did that happen with respect to the date—

MR. GILLESPIE: Objection. He just answered the fourth time, Judge.

BY MR. HOGAN:
Q —to the date you were found guilty, Mr. Hawkins?

THE COURT: He can answer.

BY THE WITNESS:
A Around the 19th or the 20th.
BY MR. HOGAN:
Q When was it you were found guilty, do you remember?
A No.
Q Well, if I told you that you were found guilty on **[1564]** the 27th, the next Friday, would that refresh your recollection?

MR. GILLESPIE: If he told him that he would be leading. Objection.

MR. HOGAN: I'm entitled to when he just says he doesn't remember.

THE COURT: He is refreshing his recollection. So, I will let him do it. Overruled.
BY THE WITNESS:
A Yes, it sounds like it.
BY MR. HOGAN:
Q So, the trial continued for another week, is that right?
A Yes.
Q Did you have a conversation right before the verdict with Swano?
A Yes.
Q Where did that take place?
A In the bull pen.
Q What did he tell you then?
A He said he had done everything that he could.
Q Now, at that time what did you think was the status of the fix right before the verdict?

MR. GILLESPIE: Objection. His opinion is not relevant.

[1565] THE COURT: Objection sustained.
BY MR. HOGAN:
Q Had you had any other conversations with Mr. Swano about the status of the fix up until that time?

A Yes.
Q When did they occur, do you remember?
A No, not the exact date.
Q Where did they take place, do you remember?
A In the bull pen.
Q What was it that he said?
A He said that the judge gave him the money back.
Q Did he tell you when that had happened?
MR. GILLESPIE: Objection. Asked and answered.
THE COURT: Sustained.
MR. HOGAN: May I have a minute, Judge.
THE COURT: Yes.
MR. HOGAN: Just a second, Judge.
(Brief pause.)
THE COURT: Are you just about concluded?
MR. HOGAN: Actually not.
THE COURT: We will take a recess.
(Recess.)
THE COURT: Who is doing the cross? Mr. Martin?
[1566] MR. GILLESPIE: Yes, Judge. It will be nice and crisp.
THE COURT: Good.
How much more do you have?
MR. HOGAN: Not a log, Judge.
THE COURT: A few minutes?
MR. HOGAN: How many?
THE COURT: A few minutes?
MR. HOGAN: No more than a half hour.
THE COURT: A half hour?
MR. HOGAN: No more than that.
THE COURT: You had an hour and a half last night and an hour and a half today.
MR. MENDELOFF: Judge, we're putting in our case. Aren't we allowed to have whatever time we need to put it in?

MR. HOGAN: I'll try and make it short, Judge, but I don't think it will be more than a half hour.

(Proceedings had in the presence of the jury.)

THE COURT: Please be seated.

Continue, please.

MR. HOGAN: Thank you, your Honor.

BY MR. HOGAN:

Q Now, Mr. Hawkins, right before the break you told us that on the 19th you had a conversation with Mr. [1567] Swano in which he told you that the judge wanted to give the money back and then later in the day you told us that he told you he may have overreacted, correct?

BY THE WITNESS:

A Yes.

Q Subsequently you told us that that day or the next day Swano told you he had actually given him the money back, right?

MR. BREEN: Judge, I object to his repeating the evidence.

MR. HOGAN: I'm about to impeach Mr. Hawkins, Judge. I have the right to do that.

THE COURT: Okay.

BY MR. HOGAN:

Q Do you remember that?

A Yes.

Q Now, Mr. Hawkins, are you certain of the dates in this case?

MR. GILLESPIE: Objection, Judge. He answered twice. He said the 19th or 20th.

MR. HOGAN: I think I am allowed to ask that, Judge.

THE COURT: You can ask him.

BY MR. HOGAN:

Q Are you certain of the dates, Mr. Hawkins?

[1568] A Certain of the dates of what?

Q Of any of the dates in the case.

A No, not precisely.
Q Do you remember meeting with me and an FBI agent named Ken Samuels on February 14th of this year, just about a month ago, over at the MCC, on a Sunday?
A Yes.
Q Were we talking about your testimony in this trial and preparing you to testify at that time?
A Yes.
Q Do you remember telling me on that occasion that on the 19th, when you talked to Mr. Swano, he told you that the judge wanted to give the money back?
A I thought he said he gave him the money back and then he said he overreacted.
Q When he said he overreacted, do you remember telling me that you had further conversations with Mr. Swano and he told you at that point that the judge still had the money and he was going to continue to try and work on having—

MR. GILLESPIE: Objection, Judge.

BY MR. HOGAN:
Q —having the judge keep the money?

THE COURT: He can impeach his witness or have him clarify it.

[1569] BY MR. HOGAN:
Q Do you remember that?
A Yes, sir.
Q And did Mr. Swano tell you he was still working on it and the judge would keep the money and let the trial go on?
A Yes.
Q Do you remember then telling me you had similar conversations over the next couple of days with Mr. Swano on that topic?
A Yes, sir.
Q And that the judge still had the money and was going to let the trial go on?

A Yes.

Q Do you remember telling me that on the 27th, immediately before the verdict, Bill Swano came back and talked to you in the bull pen?

A Yes.

MR. GILLESPIE: I'm objecting to this. He is leading the witness.

THE COURT: I think you are leading him. I appreciate the fact that you wanted to clear up a discrepancy in the testimony but—

BY MR. HOGAN:

Q Do you remember telling me and Mr. Samuels on that **[1570]** occasion that it was then that Swano told you that the judge had given the money back actually?

MR. GILLESPIE: Objection, your Honor.

MR. HOGAN: This is impeaching.

MR. GILLESPIE: Judge, counsel is leading and testifying.

MR. HOGAN: No, it is not. It is exactly not that.

THE COURT: Well, overruled. He can answer it.

BY MR. HOGAN:

Q Do you remember telling me and FBI agent Ken Samuels that it was at that time, on the 27th, when he came back to tell you what the verdict was going to be and Swano actually told you that the judge had given him the money back?

A Yes.

MR. GILLESPIE: Objection, again. I ask that it be stricken.

THE COURT: Overruled.

BY MR. HOGAN:

Q Now, Mr. Hawkins, in that conversation Mr. Swano had with you right before you went back into the courtroom for the verdict what was it that he told you about what he expected the verdict to be?

APPENDIX D

[Dated March 8, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS J. MALONEY and ROBERT McGEE,

Defendants.

Case No. 91 CR 477—Judge Leinenweber

MEMORANDUM OPINION AND ORDER

FACTS

In 1993, Thomas J. Maloney ("Maloney") was convicted of taking bribes to fix cases in his Cook County, Illinois courtroom. His alleged bagman, Robert McGee ("McGee"), was also convicted in connection with the bribery scheme. A jury found Maloney guilty of violating racketeering, racketeering conspiracy, conspiracy to commit extortion, and obstruction of justice statutes. McGee was convicted in connection with some of the bribes under the same statutes. McGee, however, was not charged with obstruction of justice.

Defendants Maloney and McGee now move the court to arrest the judgments, for judgments of acquittal, and for a new trial.

DISCUSSION

I. Motion in Arrest of Judgment

A motion under Rule 34 of the Federal Rules of Criminal Procedure for arrest of judgment may be granted only when the indictment does not charge an offense or the court is without jurisdiction. *U.S. v. Whitted*, 454 F. 2d 642, 646 (8th Cir. 1972). In the present case, the court denies defendants' motions to arrest the judgments for three reasons. First, jurisdiction is proper under 18 U.S.C. §§1503, 1951, 1962(c) and 1962(d). Second, the court finds that the indictments sufficiently charged defendants with racketeering, racketeering conspiracy, extortion, and obstruction of justice. Third, as the court previously held, the Racketeering Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. §1961 *et seq.*, is constitutional.

II. Motion for Judgment of Acquittal

The Seventh Circuit has repeatedly stated the standard of review under Rule 29(c) of the Federal Rules of Criminal Procedure is the following: "Whether at the time of the motion there was relevant evidence from which the jury could reasonably find the defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government." *See, e.g., U.S. v. Hagan*, 913 F.2d 1278, 1281 (7th Cir. 1990). Rule 29(c) relief is appropriate where the relevant evidence is insufficient to prove all the elements of the charged offense. *U.S. v. Beck*, 615 F.2d 441, 448 (7th Cir. 1980).

Contrary to defendants' assertions, the court finds that the evidence presented at trial sufficiently established the necessary elements of the offenses charged. The court

further finds that after weighing all of the evidence presented at trial, a reasonable juror could have found defendants guilty beyond a reasonable doubt.

III. Motion for New Trial

A. Standard of Review

Rule 33 of the Federal Rules of Criminal Procedure provides that "the court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." However, the court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. *U.S. v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989). Also, before a new trial can be granted, the evidence must preponderate heavily against the verdict such that it would be a miscarriage of justice to let the verdict stand. *Id.*

Defendants have presented the court with multiple arguments in support of their motions for a new trial. The court will specifically address two theories offered by defendants. First, defendants claim they are entitled to a new trial because the government suppressed material evidence favorable to defendant, a violation of *Brady/Giglio*. Second, defendants maintain that the government's knowing presentation of false and misleading testimony violated their due process rights which, likewise, warrants a new trial.

B. *Brady/Giglio* Violations

According to defendants, the government suppressed information regarding a number of government witnesses. Specifically, defendants argue that the government failed to disclose evidence of misconduct by Earl Haw-

kins ("Hawkins") and Derrick Kees ("Kees") and that Hawkins had allegedly been given a favorable side deal by an Assistant United States Attorney ("AUSA"). Defendants also claim that the government withheld facts that were detrimental to the credibility of government witnesses William Swano ("Swano") and Robert Cooley ("Cooley"). Defendants argue that if they had been aware of the information suppressed by the government, the outcome of the trial would have changed.

The United States Supreme Court has held that, "the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Also, in *Giglio v. U.S.*, 405 U.S. 150, 154 (1972), the Court found that suppression of material evidence affecting a government witness' credibility constitutes a *Brady* violation. To demonstrate a *Brady/Giglio* violation, a defendant must establish three elements: (1) the government suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material. *Moore v. Ill.*, 408 U.S. 786, 794-95 (1972). Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S. v. Jackson*, 780 F.2d 1305, 1309-10 (7th Cir. 1986). A "reasonable probability," according to the court in *Jackson*, is a probability sufficient to undermine confidence in the outcome. *Id.* at 1310.

First, the court will address defendant's claims with respect to the evidence withheld from defendants, which allegedly was relevant to the credibility of the El Rukn witnesses, Hawkins and Kees. The court is mindful that the withholding of such information has, in other cases,

been found deliberate and material, thus requiring new trials. *See U.S. v. Burnside*, 824 F.Supp. 1215 (N.D.Ill. 1993) (Holderman, J.); *U.S. v. Andrews*, 824 F.Supp. 1273 (N.D.Ill. 1993) (Conlon, J.); *U.S. v. Boyd*, 833 F.Supp. 1277 (N.D.Ill. 1993) (Aspen, J.). However, there is a qualitative difference in the El Rukn testimony in those cases and the El Rukn testimony in this case. In the former, the guilt or innocence of the defendants rested on the believability of the El Rukn witnesses. Here, the guilt or innocence of the defendants Maloney and McGee did not depend on the believability of Hawkins and Kees. Simply put, the El Rukn witnesses were not testifying to contested issues.

During defendants' trial, the fact that the El Rukn's sought to bribe Maloney through the offices of Swano was not contested. Similarly, the fact that the El Rukn's initially believed that Swano had an agreement with Maloney to acquit Hawkins in return for a cash bribe was uncontested. Throughout the trial, it was the theory of the defense that Swano was "rainmaking," *i.e.*, pocketing money from his clients who believed he was using it to bribe judges. The evidence introduced through the El Rukn testimony actually corroborated defendants' theory of defense by showing the El Rukns came to believe that Swano was, in fact, rainmaking after they heard that Maloney had convicted Hawkins and sentenced him to death.

Therefore, given the El Rukn tainted testimony did not contradict the core theory of defense, the court finds that the testimony of the El Rukn witnesses was only collaterally related to the case. The credibility of the El Rukn witnesses and the substance of their testimony did not directly affect the outcome of the case. Therefore, assum-

ing the government did, in fact, suppress evidence, it was not "material" as defined in *U.S. v. Jackson*, 780 F.2d 1305, 1309-10 (7th Cir. 1986).

Second, the court finds that the information withheld by the government that allegedly would have aided the impeachment of Cooley and Swano, likewise, lacked the degree of relevance necessary to make the withheld information "material." Defendants argue that the government withheld allegations by Clint Ford ("Ford"), a former client of Swano, that would have adversely impacted his credibility. In a motion filed in connection with his sentencing, Ford claimed that Swano lied to him about his (Swano's) legal predicament at the time. In addition, defendants maintain that the government withheld statements made by Cooley when he first came forward to cooperate with the government in 1986, which allegedly are inconsistent with Cooley's testimony during defendants' trial. The information suppressed by the government was that Cooley initially told AUSA Gary Shapiro that he "didn't" have to bribe judges."

The court once again finds that even if the government suppressed information helpful to defendants, it was not of significant consequence to be "material." During the trial, defendants assailed the character of both Swano and Cooley by introducing testimony concerning their illicit endeavors, including accepting drugs in lieu of legal fees and perjury. Therefore, the court finds that the additional impeachment evidence presented by defendants was cumulative to a sufficient degree so as not to raise a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *See U.S. v. Bagley*, 473 U.S. 667, 682 (1985).

C. Knowingly False Testimony

Defendants also claim that during their trial the government knowingly presented false testimony, a violation of the Due Process Clause of the Fifth Amendment. Their claim states that the government was aware that statements made by Hawkins and Swano during defendants' trial were false.

The United States Supreme Court has repeatedly held that the Due Process Clause of the Fifth Amendment forbids conviction of a person through the prosecutor's knowing use of perjured testimony. *Napue v. Ill.*, 360 U.S. 264, 269 (1959). According to the Seventh Circuit Court of Appeals, a new trial should be ordered, on the basis of the prosecutions' use of perjured testimony, "if the defendant establishes that (1) the prosecution's case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is any likelihood that the false testimony could have affected the judgment of the jury." *U.S. v. Guadagno*, 970 F.2d 214, 220 (7th Cir. 1992). The Seventh Circuit has also decided that in order to establish perjury, the defendant must show more than mere inconsistencies in testimony. *U.S. v. Verser*, 916 F.2d 1268, 1271 (7th Cir. 1990).

The court first finds that a new trial is unwarranted on the basis of the alleged perjured testimony of Hawkins, an El Rukn witness. Defendants have failed to satisfy all of the elements set forth by the Seventh Circuit in *Guadagno*. Specifically, the court is not persuaded that there is any likelihood that the false testimony could have affected the judgment of the jury. Ultimately, the El Rukn testimony was only tangentially related to the main issues in this case and the credibility of the El Rukn witnesses were not a major issue.

Next, defendants' arguments for a new trial based on alleged perjury by Swano suffer from similar deficiencies. First, as in the case of Hawkins, the evidence presented by defendant does not establish that Swano's testimony constituted perjury. Second, the court finds that even if Swano did perjure himself at trial, there is no likelihood that the false testimony could have affected the judgment of the jury.

CONCLUSION

In addition to the specific theories discussed above, the court has considered the myriad other arguments presented by defendants' in their post trial motions. Defendants' motions for arrest of judgment, motion for judgment of acquittal, and motion for a new trial are denied.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

DATED: March 8, 1994

APPENDIX E

[6/19/86 12:10 p.m.]

	James Speights] Yes, Chief.
FORT: Nom. Let that Emir know, we got that, them papers back (UI) we got it back to him.	Okay. Tell Alan Knox that the El Rukn Sunni Muslim charter papers (UI) back to him.
MAUMEE: Nom, Iman. Uh, we, we draw him and Toom was gonna' try to hook up somethin' with Entertainer.	Yes, Chief. Uh, I understand that Knox and Henry Harris are going to try to arrange a drug deal with Jack Benny.
FORT: Nom. Swan . . . should go on down there and peep Swan.	(UI) should go down there and see Swano.
MAUMEE: Nom, Iman.	
FORT: Swan said that demonstration didn't go through with the Robe?	Swano said that the Judge had called off the fix?
MAUMEE: Nom, Iman.	Yes, Chief.
FORT: Make arrangement and get that back and still tell Swan to put	Make arrangements to get the money back and tell

his best, best fight in on that demonstration, al go well, we're gonna' still look out, for him on a bonus.

Swano to continue to do his best in the trial and if he wins I'll still give him a bonus.

MAUMEE:
Nom, Iman.

Yes, Chief.

FORT:
Both of them, we'll look out for both of them on a bonus.

I'll give Both Swano and Smeeton bonuses.

MAUMEE:
Nom, Iman. Nom, Iman.

Yes, Chief.

FORT:
We're gonna' be in touch with Ban and a love truth and a tangerine.

I'll call Bernard Green back at 2:30 p.m.

MAUMEE:
Nom, Iman. Reach for him and let him know?

Yes, Chief. Should I tell him when he gets here?

FORT:
Ban there, Bank there, on their way now, bringin' Rajah now, you can let him know then.

Green is on his way to the Fort with Thomas Bates now, you can let him know when he gets there.

[6/19/86 3:14 p.m.]

FORT:
Nom.

Yes.

OMAR:
Nom. He say, he's sayin' we gonna' be maintainin' that ah, not the pillow there, but out that way he be demonstratin'.

Yes. Swano said that he would be at his office, that he wasn't going home yet.

FORT:
Ah, yeah, at, at, at the place.

Yeah, at his office.

OMAR:
Nom, Iman.

Yes, Chief.

FORT:
G.G., he gonna' bring ch . . . GG had just moved out to the Robe.

I just sent Alan Knox out to the trial.

OMAR:
Nom, Iman. He had ah, that Perry had demonstrated that ah, he may have overreacted, he said he had talked to the ah, ah, them people there that he was demonstratin' with . . .

Yes, Chief. Swano told me that he may have overreacted when he said said the fix was off; he said he had talked again to the people he had fixed the case with . . .

FORT:
Nom.

Yes.

OMAR:
. . . and they hadn't really gotten' back with him on anything. He say he gonna' be demonstratin' with them as soon as he get back to his place.

. . . and they hadn't given him a final answer on whether the fix would go through. Swano said he would talk to them again when he got back to his office.

FORT:
Send G.G. out to get the stuff from him.

I want Alan Knox to get my money back from Swano.

OMAR:
Nom, Iman.

Yes, Chief.

FORT:
He don't, he just playin' games and stuff.

Swano is playing games with us.

OMAR:
Nom.

Yes.

FORT:
He, it ain't no Robe involved period.

The Judge is not going to fix this case.

OMAR:
Nom, Iman.

Yes, Chief.

FORT:
Victory (UI) just hold it for hisself.

OMAR:
Nom, Iman.

[6/20/86 3:08 p.m.]

OMAR:
Nom, just ah, just, just the team there and, and ah, ah, ah, the Ambassador there.

Yes, just Alan Knox, Bernard Green, Thomas Bates, Jeff Boyd, Roosevelt Hawkins, and me.

FORT:
GG there?

Knox is there?

OMAR:
Nom, Iman.

Yes, Chief.

FORT:
Nom. Ah, did he mention, they mention about when he, when he ran away from the Rob . . . from the heels?

Good. Was Sumner questioned about when he ran away from from the police after he began to cooperate?

OMAR:
Nom. That's what they was gettin' off into when we stepped out.

Yes. That's what they were starting to question him on when I came to the phone

FORT:
You move back in. Send GG.

You go back in and send Knox back to the phone.

OMAR:
Nom, Iman.

Yes, Chief.

FORT:
Emir, the whole thing that we got to draw, we gotta' situate ourself where we may not even have to draw in the signs of brewery, period.

General, what we need to figure out and do is put ourselves in a position where we have enough cocaine on had that we don't have to constantly get more.

MAUMEE:
Nom, Iman.

Yes, Chief.

FORT:
But like that now . . .

MAUMEE:
We, eh, ah, hey, Iman?

FORT:
Nom.

MAUMEE:
We . . .

FORT:
Nom.

MAUMEE:
We . . .

FORT:
Emir. General.

G.G.:
Nom, Iman. Yes, Chief.

FORT:
Nom. Ah, ah, things lookin', lookin', lookin' okay? Things are looking okay?

[6/20/86 3:08 p.m.]

G.G.:
Ah, yeah, from here, Iman, it's looking okay there. Yes, Chief, it looks good.

FORT:
Nom. Good.

G.G.:
We touch down with, ah, with him there before he went back in off of lunch there? I talked to Swano before he went back into court after lunch.

FORT:
Nom.

Yes.

G.G.:
But he was demonstratin' that ah, ah, that everything was still set. So I told him wha . . . he had demonstrated with the brother the other day that ah, everything was on hold; so, I was askin' him what he meant by that. He said that he didn't manifest his portion until the next day to the guy, and that's why the guy had told him just hold up. So I told him, I said, well ah, We got to know if something definitely; is we got agreement or we don't have agreement. I said, we don't have agreement, I'd like to ah, draw that star there. But he was sayin' that we got an agreement.

Swano told me that the fix is still set. So, I told him I know that he told Roland Lewis yesterday that he wasn't sure anymore that the fix would go through, and I asked him what he meant by that. Swano said that he didn't give the middleman the balance of $6,000 for the bribe until the next day and that's why the bagman had given him the message from the Judge that the fix might not go through. I told Swano that you had to know if the fix was definite; is there a firm agreement or not; if not, I need the money back. Swano said the fix is still set.

FORT:
Okay.

Okay.

G.G.:
So I told him that we need to touch back down after he get through ah, ah, demonstratin' with ah, Doorknob there.

I told Swano that we needed to talk again after he finishes cross-examining Sumner.

FORT:
Nom. We don't want, you know, he don't have to straggle the fence with us, 'cause we have look'ded out for him. If we got agree . . . see, he's lyin' I know that, but you gotta' set him . . .

Good. Swano doesn't have to straddle the fence with us, because I have taken care of him in the past. You gotta' lock 'em in on what the outcome is actually going to be . . .

G.G.:
Nom, Iman. Nom, Iman.

Yes, Chief.

[6/20/86 3:08 p.m.]

FORT:
. . . off, it didn't have nothin' to do with no, he didn't mention about no other color . . .

. . . his explanation today doesn't seem right to me, because he didn't say yesterday that he still needed to give the bagman the $6,000 balance of the bribe . . .

G.G.:
Nom, Iman

FORT:
. . . it's on. You know, then there's the continued goin'— it's on.

. . . before the fix would be certain. Then as the trial continues, he's sayin' the fix is certain again.

G.G.:
Nom, Iman.

FORT:
Then he's straggling the fence all the way up to the end, to where . . . tell him, you know, just stop some of the Mosaliques thinkin' . . .

Pretty soon we're at the end of the trial a firm answer . . . tell Swano that some of the Generals think . . .

G.G.:
Nom, Iman.

FORT:
. . . that he's stragglin' the demonstration all the way through . . .

. . . that he's playing games with us . . .

G.G.:
Nom, Iman.

FORT:
He's, you know, he's, he's, he's stragglin' the demonstration all the way up to the point to say ah, if it's victory, then all'll . . . you know, that's what some of the Mosaliques sayin', tell him, you know; I'm not sure of that type of impression . . .

That he's planning to tell us when he wins the case that it was fixed . . . tell him that's what some of the Generals think is going on; he should know better than to create that type of impression . . .

G.G.:
Nom.

FORT:
. . . if ah, if it was on, it was on; if it was off, it was off. He had to know it was off.

. . . he has to know whether the fix is on or not.

G.G.:
Nom, Iman.

[6/23/86 7:51 p.m.]

G.G.:
. . . so, so I told, I say, "Yeah, but all I got to do is just touch down with one man and and then ah, he can straighten everything out as long as you was sure what you sayin' to me."

. . . so, I told him that all I had to do was talk to you, Chief, and there wouldn't be any problems as long as you're telling us the truth about the fix.

FORT:
So you let him know that ah, you know, he got ah, you know, he got ah, got our trust and ah, but ah, you know, the Mosaliques really overseein' the whole demonstration.

Let him know I do trust him, but I'm relying on the Generals to oversee the whole situation and let me know what's going on.

G.G.:
Nom.

FORT:
You know and ah, so We had to convince them that, that he should maintain that star.

Tell him that I had to convince the Generals to let him keep the money.

G.G.
Nom.

FORT:
But in addition to what they told, what they demonstrated with yourself, and what they asked Us, was that not let it

And tell him that in addition to the suspicions the Generals told you and me about,

be no more star until last word on this one and the last word on that one, because originally they wanted to put that star towards the other one that they thought was real nasty. Follow what I'm sayin'?

they asked Me not to give him any more money until both Smith/Hickman and Vaughn/White because they because they originally wanted to pay the fix on Vaughn/White because they thought it was a real problem. Understand?

G.G.:
Nom, Iman.

Yes, Chief.

FORT:
And they said that if it's not a victory in the next one, that star must manifest.

And tell him that the Generals said that if we lose Vaughn/White, the $10,000 must be returned.

G.G.:
Nom, Iman.

FORT:
And they said they gonna' hold yourself and ah, him responsible for that.

Tell him that the Generals said they are holding you and him

[6/27/86 2:30 p.m.]

FORT:
We have go on on the appeal demonstration.

We'll have to take our chances on the appeal.

BANTU:
He say he'd like to ah, like to see G.G. tomorrow, uh, at a grape and ah, . . .

Swano said he wanted to see Alan Knox at . . .

RAJH &
OMAR:
. . . love.

. . . 11:00.

BANTU:
. . . and a love, in the signs of givin' 'em that back he say.

. . . 11:00 to give him the bribe money back.

FORT:
Yeah, see, that chump, man that chump ah, played games, He played games with that there.

Yeah, see, Swano played a game with us.

GROUP:
Nom, Iman.

Yes, Chief.

FORT:
He maintaining that right at his demonstration, you know, he didn't you know, he played games with that there when he, when we, you know, when we, when we should've of really went with a jury.

Swano has that money right at his office. He played dames with that money. We should have

GROUP:
Nom, Iman.

Yes, Chief.

OMAR:
Because ah, Iman. . .

Because, Chief . . .

FORT:
Nom.

Yeah.

OMAR:
. . . from the ah, from the beginning of the demonstration before we even went off into

. . . Swano said from the start that we should have had a jury trial. That's

ah, ah, the trial type
demonstration that's what that
one there was demonstrating in
the signs of ah, the twelve.
That's how he had demonstrated
from the beginning, but after
we get down to the point where
it was at, then he, then he
changed the demonstration over
in the signs of just that one,
that one character there.

what he said at the
start, but after we got
down to the time of
trial, then he changed
his mind and when with a
bench trial.